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In The

Supreme Court of the United States

October Term, 1986

JOSEPH J. SANTACROCE, Sheriff of Nassau County; WALTER J. FLOOD, Warden of Nassau County Correctional Center,

Petitioners,

vs.

HERBERT BADGLEY, JAMES BARNES, MITCHELL CHAPMAN, ROBERT GUNSBERG, (a/k/a ROBERT ALVINO), MAURICE McCORKLE, FRANK RICCHIUTI, OSCAR RODRIGUEZ and HENRY SMITH, inmates of the Nassau County Correctional Center and EUGENE CHAPMAN, LEE McCORKLE and KATHERINE RICCHIUTI, members of inmates' families, individually and on behalf of all persons similarly situated; WILLIAM G. McMAHON, Chairman, New York State Commission of Correction, and THOMAS A. COUGHLIN, III, Commissioner, New York State Department of Correctional Services, individually and in their official capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES M. CATTERSON, JR.
314 Main Street
Port Jefferson, New York 11777
(516) 473-1122

WILLIAM H. PAULEY III
SNITOW & PAULEY
415 Madison Avenue
New York, New York 10017
(212) 935-0833

Counsel for Petitioners

4883
Lutz Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-4640 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

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QUESTIONS PRESENTED

1. Whether the court of appeals' action in conducting a *de novo* review and weighing of the district court' s findings of fact exceeded the scope of review authorized by Fed. R. Civ. P. 52(a)?

2. Whether the court of appeals' "hostage" theory of contempt is such a wide departure from the accepted and usual course of judicial proceedings as to constitute a clear abuse of its authority?

3. Whether the mandate of the court of appeals is so vague and ambiguous as to preclude its implementation by the district court?

4. Whether in the absence of issues involving fundamental constitutional guarantees, the court of appeals exceeded this court's stated policy of federal judicial restraint in matters relating to local jail administration?

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OPINIONS AND ORDERS BELOW

On October 9, 1984, the district court approved and filed an amended consent decree in *Badgley v. Varelas*, 80 Civ. 2916 (JM). The amended consent decree is not reported (1a).

On January 6, 1986, the district court (Mishler, J.) filed a memorandum of decision and order in *Badgley v. Varelas*, 80 Civ. 2916 (JM), which is unreported (17a).

On August 25, 1986, the court of appeals filed an opinion and entered a mandate in *Badgley v. Santacroce* [1], Docket No. 86-2035, which is reported at 800 F.2d 33 (2d Cir. 1986) (23a).

On September 23, 1986, the court of appeals filed an order recalling the mandate in *Badgley*, Docket No. 86-2035, and staying the mandate until 5:00 p.m., September 25, 1986. The order is not reported (34a).

On September 25, 1986, the court of appeals filed an order further staying the mandate in *Badgley*, Docket No. 86-2035, until 5:00 p.m., September 29, 1986. The order is not reported (36a).

On September 29, 1986, the court of appeals filed an order further extending the stay of its mandate in *Badgley*, Docket No. 86-2035, until 5:00 p.m., October 6, 1986. The order is not reported (38a),

On October 6, 1986, the court of appeals filed an order in *Badgley*, Docket No. 86-2035, terminating the stay of the mandate and ordering that the provisions of paragraph 31 of the amended consent judgment become effective at 12:01 a.m., October 8, 1986. The order is not reported (40a).

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1. Joseph Santacroce was appointed sheriff of Nassau County on January 1, 1986 and succeeded Mr. Varelas, who had passed away.

JURISDICTION

The mandate of the United States Court of Appeals for the Second Circuit was entered on August 25, 1986 and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure: Rule 52. Findings by the Court

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules

12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

N.Y. Const. art. XIII, § 13(a) [Law enforcement and other officers]

(a) Except in counties in the city of New York and except as authorized in section one of article nine of this constitution, registers in counties having registers shall be chosen by the electors of the respective counties once in every three years and whenever the occurring of vacancies shall require; the sheriff and the clerk of each county shall be chosen by the electors once in every three or four years as the legislature shall direct. Sheriffs shall hold no other office. They may be required by law to renew their security, from time to time; and in default of giving such new security, their offices shall be deemed vacant. But the county shall never be made responsible for the acts of the sheriff. The governor may remove any elective

sheriff, county clerk, district attorney or register within the term for which he shall have been elected; but before so doing he shall give to such officer a copy of the charges against him and an opportunity of being heard in his defense. In each county a district attorney shall be chosen by the electors once in every three or four years as the legislature shall direct. The clerk of each county in the city of New York shall be appointed, and be subject to removal, by the appellate division of the supreme court in the judicial department in which the county is located. In addition to his powers and duties as clerk of the supreme court, he shall have power to select, draw, summon and empanel grand and petit jurors in the manner and under the conditions now or hereafter prescribed by law and shall have such other powers and duties as shall be prescribed by the city from time to time by local law.

N.Y. Correct. Law § 504(1) (McKinney Supp. 1986) Designation of substitute jail

1. If there is no jail in a county, or the jail becomes unfit or unsafe for the confinement of some or all of the inmates, civil or criminal, or is destroyed by fire or otherwise, or if a pestilential disease breaks out in the jail or in the vicinity of the jail and the physician to the jail certifies that it is likely to endanger the health of any or all of the inmates in the jail, the state commission of correction, upon application, must, by an instrument in writing, filed with the clerk of the county, designate another suitable place within the county, or the jail of any other county, for the

> confinement of some or all of the inmates, as the case requires. The place so designated thereupon becomes, to all intents and purposes, except as otherwise prescribed in this article, the jail of the county for which it has been so designated, and the purposes expressed in the instrument designating the same. The designation may be amended, modified or revoked by the state commission of correction by a subsequent instrument in writing filed with the clerk of the county.

STATEMENT OF THE CASE

This § 1983 civil rights class action was filed by the Nassau County Legal Aid Society on behalf of pre-trial detainees and sentenced inmates incarcerated at a local jail known as the Nassau County Correctional Center ("NCCC"). Although it addressed the nettlesome problem of local jail overcrowding, at no time was the constitutionality of conditions of confinement reached. Rather, at an early stage in the proceedings, the Badgley class opted to enter into a consent decree with the sheriff and the warden which decree provided *inter alia* for an in-house population cap. In October 1984, the population cap was adjusted by an amended consent decree (1a-16a). Neither decree established constitutional minima but did provide the matrix for continual sparring between the parties with respect to implementation and enforcement.

On October 17, 1985, the Badgley respondents moved to adjudge Acting Sheriff Santacroce and Warden Flood in contempt for failing to comply with paragraphs 4 and 31 of the amended consent decree. Paragraph 4 fixes the maximum in-house population of NCCC's core facility at 710 inmates. This figure represents 85 per cent of the beds, including second bunks and special housing units in the central core building. Paragraph 31

of the decree is the operative provision and incorporates prior orders of the district court. In pertinent part, paragraph 31 provides:

> ORDERED, that the defendant Thomas J. Varelas, Sheriff of Nassau County, or his successor, shall not deliver any persons to NCCC on or after this date whether such person is a sentenced inmate, pre-trial inmate or in any other status, until such time as the maximum in-house population of NCCC is no more than 710 plus the number of inmates actually housed in the dormitories, and thereafter shall not deliver such persons to NCCC where such delivery will increase the in-house population above 710 inmates, excluding those inmates actually housed in the dormitories, and it is further
>
> ORDERED, that the defendant, Walter J. Flood, Warden of NCCC, or his successor, shall not accept any persons at NCCC on or after this date whether such person is a sentenced inmate, pre-trial inmate or in any other status, until such time as the maximum in-house population of NCCC is no more than 710 plus the number of inmates actually housed in the dormitories . . .

(13a-14a). Another provision of the amended decree, paragraph 32, allows the petitioners to accept persons charged with class A or B felonies, and persons remanded to their custody without bail or with bail of $100,000 or more "without regard to the in-house population cap." (14a).

That the decree's in-house population cap of 710 inmates in NCCC's core facility had been exceeded was not in issue on

the contempt motion. However, the sheriff and the warden submitted extensive evidence of their efforts to keep the population in NCCC's core facility below the population cap fixed by the decree.

The district court specifically found by clear and convincing evidence that the warden and the sheriff had made every reasonable effort to comply with the decree. It further found that it was impossible for them to comply without the assistance of others. Accordingly, the district court determined that it was factually impossible for the warden and sheriff to comply and denied the motion to punish them for contempt (19a-20a).

The Badgley respondents appealed.

By an opinion and mandate filed August 25, 1986, the court of appeals reversed and remanded the cause with directions to enter forthwith an order declaring paragraph 31 of the amended consent decree to be operative 30 days thereafter. The court of appeals also directed the district court "to hold the county defendants [the sheriff and the warden] in civil contempt in the event of any subsequent failure to implement paragraph 31 . . . and, in that event to assess compensatory damages in favor of the [Badgley respondents] of not less than $5,000 for each person admitted to the NCCC in violation of the amended consent judgment." *Badgley v. Santacroce*, 800 F.2d 33, 39 (2d Cir. 1986) (32a-33a).

REASONS FOR GRANTING THE WRIT

I.

In what was tantamount to a *de novo* weighing of the evidence, the court of appeals recast the district court's findings of fact, made unwarranted assumptions, and thereby misapplied Fed. R. Civ. P. 52(a) in direct conflict with the rulings of this Court and other courts of appeals.

The district court, thoroughly familiar with all of the prior proceedings in this civil action,[2] made extensive fact findings in the course of this contempt proceeding and determined that the material facts were not in dispute (19a). The district court found:

> The Sheriff of Nassau County and the Warden of NCCC have *demonstrated by clear and convincing evidence* that since the effective date of the Amended Consent Decree they have made every reasonable effort to comply with the directions in the decree and in particular with the order to keep the inmate population below the maximum of 710.

(Emphasis added) (19a-20a). Therefore, the district court held that: "it is impossible for them to comply with the decree without the assistance of the state officials," (citations omitted) (20a) and "[t]heir failure to maintain less than 710 inmates in the core facility was not a willful disobedience of the decree." (citations omitted) (20a).

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2. *Badgley* was assigned to Senior District Judge Mishler in January, 1983. Thereafter, he closely supervised the work of a special master, heard numerous motions and rendered at least 17 memoranda decisions and orders on a variety of substantive and procedural issues.

The court of appeals concluded otherwise. To substantiate its conclusion, the Second Circuit fashioned new findings which had not been briefed or considered in the district court. Gaining succor in N.Y. Correct. Law § 504(1), which authorizes application to state authorities for an alternative place of confinement, the court of appeals proceeded to set up a strawman. The court infused the record thusly: "the county defendants do not contend that designation of an alternate place to house inmates has ever been sought and denied." *Badgley*, 800 F.2d at 37 (29a). Had the petitioners so acted, the court of appeals reasoned, they would have had "available a course of action that would allow them to comply with both the amended consent judgment and state law." 800 F.2d at 37 (29a).

The mischief attendant to this approach is four-fold. First, it establishes facts never briefed or litigated by the parties in the district court. Second, it assumes that an application to appropriate state officials was never made.[3] Third, it further assumes that

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3. In fact, proceedings in the district court demonstrate that numerous previous applications were made by the sheriff to designate the jails of other counties as suitable places for the confinement of some Nassau County inmates. Alternative jail orders were issued by the New York State Commission of Correction to the sheriff of Nassau County designating jails throughout the State of New York for use by Nassau County. At the time of the contempt motion, there were more than 175 inmates in the custody of the sheriff who were housed in a gulag archipelago of alternate jails outside of Nassau County. As the overseer of local jails, the New York State Commission of Correction, has the sole power to authorize such designations. The purpose is to permit the state commission to monitor and control the conditions under which local prisoners are confined.

Additional applications for alternative jails were filed following entry of the court of appeals' mandate. Although several additional beds were made available in upstate county facilities, no meaningful solution has been forthcoming and the effect at NCCC has been *de minimus*. In actuality, N.Y. Correct. Law § 504(1) is a monitoring and not a "resource" provision. Thus, the course of action that the court of appeals believed would allow the sheriff and warden to comply with the prisoner population cap was illusory.

an application by petitioners pursuant to N.Y. Correct. Law § 504(1) would result in depopulation of NCCC and permit the petitioners to comply with the mandate. Lastly, it presents a *fait accompli* that precludes petitioners from rebutting such findings in the penultimate forum.

The court of appeals also reached back to an unrelated hearing in the district court in March, 1984 to cull testimony of the then administrative judge of Nassau County to support its assumption that the petitioners could comply with the amended consent decree. It wrenched a single statement out of that unrelated evidentiary hearing and used it to upset the trial judge's finding of impossibility. Thus, court of appeals found that: "state judges do not commit prisoners to specific facilities and would not direct the sheriff to take prisoners to the NCCC in light of the federal court's order barring delivery and acceptance of additional inmates." *Badgley*, 800 F.2d at 37 (30a). Such a finding by the court of appeals was *dehors* the record and ignored the harsh reality that the sheriff has no place other than NCCC in which to safely and legally house persons committed to his care.

The practical and legal effect of the approach of the court of appeals is a fundamental and total denial of petitioners' right to be heard.

The finding of impossibility of compliance by the district court, a pure or "inferential" finding of fact, should not have been reversed unless it was clearly erroneous. *Mucha v. King*, 792 F.2d 602, 608 (7th Cir. 1986). "The action of the trial court upon a charge of contempt is discretionary in character and is not to be reversed except for abuse of discretion or unless clearly erroneous." *Walaschek & Associates Inc. v. Crow*, 733 F.2d 51, 53 (7th Cir. 1984) (quoting *Jewel Tea Co. v. Kraus*, 204 F.2d 549, 551 (7th Cir. 1953); *United States v. Reide*, 494 F.2d 644 (2d Cir. 1974).

Citing *United States v. Rylander*, 460 U.S. 752 (1983), the district court found, as fact, that it was impossible for petitioners to comply. In *Rylander*, this Court recently held:

> In a civil contempt proceeding such as this, of course, a defendant may assert a *present* inability to comply with the order in question. *Maggio v. Zeitz, supra*, at 75-76; *Oriel v. Russell*, 278 U.S. 358, 366 (1929). While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.

Rylander, 460 U.S. at 757 (emphasis in original). *See also, Shillitani v. United States*, 384 U.S. 364 (1966); *United States v. Wendy*, 575 F.2d 1025 (2nd Cir. 1978).

The court of appeals justified *de novo* review by characterizing the issue of impossibility as purely a question of law. When it reversed and imposed sanctions, the court of appeals transmogrified a plain finding of fact into a question of law and concluded: "[T]he district court's finding . . . is incorrect as a matter of law and must be reversed." *Badgley*, 800 F.2d 33, 38 (2d Cir. 1986) (31a). From that perspective, the court of appeals reasoned that it was not bound to any deferential standard of review (31a).

In this way, the court of appeals freed itself from the restraints of the "clearly erroneous" standard and totally disregarded the district court's account of the evidence. Such action circumvents the constraints of Fed. R. Civ. P. 52(a), exceeds the traditional scope of appellate review, and denies the petitioners due process of law. *See Singleton v. Wulff*, 428 U.S. 121 (1976); *Stafford*

v. Ford Motor Company, 790 F.2d 702 (8th Cir. 1986). It also contradicts the approach adopted by the court of appeals in *United States v. Wendy*, 575 F.2d 1025 (2nd Cir. 1978). There, in reversing a contempt against an attorney for his failure to proceed to trial, the court of appeals found that "[t]echnically speaking, Wendy may have had the ability to comply with the court's order in that, as a member of the bar, he was legally authorized to try cases. But realistically, Wendy was incapable of compliance." 575 F.2d at 1030. Such an analysis demonstrates that findings of impossibility are dependent on facts. To sweep aside those findings of fact and manufacture new ones in their stead, denies litigants full due process protections and significantly erodes the "clearly erroneous" standard of Fed. R. Civ. P. 52(a).

That the district court's findings were partially based on documentary evidence,[4] does not act to enlarge the court of appeals' standard of review. In *Anderson v. City of Bessemer City, N.C.*, 105 S. Ct. 1504 (1985), this Court held that appellate review of factual findings must be made under the "clearly erroneous" standard even when the district court's findings are based on "physical or documentary evidence or inferences from other facts," 105 S. Ct. at 1512, a holding engrafted onto Fed. R. Civ. P. 52(a) by its most recent amendment. In pertinent part, Fed. R. Civ. P. 52(a) now reads: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . ."

In reversing the Fourth Circuit in *Anderson*, this Court expressly overruled the Second Circuit's standard of review in *Orvis v. Higgins*, 180 F.2d 537 (2d Cir. 1950), and held that

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4. The evidence before the district court consisted of an affidavit sworn to by the warden who had previously testified in this action, representations made in open court during two separate hearings by counsel and other county officials, and the moving papers of the Legal Aid Society.

the Fourth Circuit had "mis-apprehended and misapplied the clearly-erroneous standard," and had "improperly conducted what amounted to a *de novo* weighing of the evidence in the record." 105 S. Ct. at 1513. The U.S. Supreme Court delineated the standard of review:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." . . . This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. *The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court* . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

Anderson, 105 S. Ct. at 1511 (emphasis added). Since that enunciation, that standard has been applied by several circuits. *See Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 16 1156

(5th Cir. 1986); *S.E.C. v. Rogers*, 790 F.2d 1450 (9th Cir. 1986); *Daly v. Hill*, 790 F.2d 1071 (4th Cir. 1986).

In reviewing a district court's imposition of contempt for the failure of substantial compliance with a consent decree, the First Circuit reaffirmed the long standing rule in that circuit that "district court findings based on undisputed facts or documentary evidence are reviewable only for clear error, the standard prescribed by Fed. R. Civ. P. 52(a) for all factual findings . . . *This is true even when a mixed question of law and fact is at issue*, as here," *Fortin v. Comm'r of Mass. Dep't of Public Welfare*, 692 F.2d 790, 794 (1st Cir. 1982) (Emphasis added).

In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court recognized the split of authority among the circuits on the "mixed question" issue:

> We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—i.e., questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority in the circuits on both sides of this question. Compare *United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 174 n.12 (CA3 1976); *Stafos v. Jarvis*, 477 F.2d 369, 372 (CA10 1973); and *Johnson v. Salisbury*, 448 F.2d 374, 377 (CA6 1971), with *Rogers v. Bates*, 431 F.2d 16, 18 (CA8 1970); and *Pennsylvania Casualty Co. v. McCoy*, 167 F.2d 132, 133 (CA5 1948). There is also support in decisions of this Court for the

> proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court, e.g., *Bogardus v. Commissioner*, 302 U.S. 34, 39 (1937); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 491 (1937); *Helvering v. Rankin*, 295 U.S. 123, 131 (1935). But cf., *Commissioner v. Duberstein*, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198, 4 L.Ed. 2d 1218 (1960); *Commissioner v. Heininger*, 320 U.S. 467, 475 (1943).

Swint, 456 U.S. at 289-90 n.19. The Second Circuit's adherence to wholesale fact review calls for the exercise of this Court's supervisory powers.

The arrogation by the court of appeals of the fact finding function of the district court and its avoidance of Fed. R. Civ. P. 52(a) constraints requires a clear restatement of policy by this Court and warrants a grant of certiorari.

II.

The Second Circuit's direction to the district court to reduce the jail population by imposing sanctions on persons who could not bring about compliance espoused a "hostage" theory of contempt in conflict with the decision of another court of appeals.

Neither the sheriff nor the warden has the power or the resources to construct new facilities or to house prisoners at any jail other than NCCC. They are entirely dependent upon other officials and entities (both local and state) for the fiscal support and material resources necessary to confine prisoners consigned to the sheriff's custody. Since the sheriff and the warden have no independent powers and no control over the flow of inmates remanded to them through the criminal justice system, they are incapable of purging their contempt.

The court of appeals ignored this reality when it assumed that local government and state agencies would rally behind the sheriff and the warden to take ameliorative action and reduce the population of NCCC. Clearly, this was speculation and vague hope, a poor currency to exchange for petitioners' factual shield against civil contempt. Particularly so, when petitioners had no say in the bargaining.

When the court of appeals assumed that the threat of contempt against resourceless individuals would prompt local and state authorities to take corrective action, it impermissibly adopted a "hostage" theory of contempt. In *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984), the Eleventh Circuit reversed a district court contempt order against the Attorney General of Alabama for failing to relieve prison overcrowding in the Alabama correctional system. In expressly rejecting the "hostage" theory, the Eleventh Circuit disapproved of the use of contempt citations against persons clearly incapable of compliance in order to induce non-parties to perform.[5] In rejecting such a subterfuge, the Eleventh Circuit held:

> There is no authority for holding Attorney General Graddick in civil contempt "to prompt the Governor, the Legislature or the Parole Board of the State of Alabama, separately or severally, to remedy the problem." This so-called "hostage" theory of contempt . . . has no legal support.

Newman, 740 F.2d at 1528. As in *Newman*, there was nothing in the record before the Second Circuit to show that the sheriff

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5. The Eleventh Circuit further held that "[w]ithout regard to whether Graddick's actions were contemptuous, we hold that it was improper to enter a sanction against Graddick for that contempt geared to the number of inmates held in overcrowded prisons." 740 F.2d at 1528.

or the warden "hold the keys to his jail cell" or that either could purge a contempt. That the remedy is framed in terms of compensatory damages does not diminish that principle. 740 F.2d at 1528.

The Second Circuit's "Iranian strategy" of holding hostage persons incapable of effecting change utilizes the contempt mechanism in precisely the way that the Eleventh Circuit forbade.

Like the individual who cannot produce documents because they are not in his possession or control, the sheriff and the warden are incapable of controlling the flow of inmates to NCCC. Their inability to comply is a defense to contempt. *See Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983); *Securities Investor Protection Corp. v. Executive Securities Corp.*, 433 F. Supp. 470 (S.D.N.Y. 1977).

Not only are both petitioners held hostage by the mandate but the sheriff is also personally liable. While the warden might look to his employer for indemnification, under New York law the sheriff is *personally* liable for the consequences of his acts, and Nassau County cannot be made responsible for him nor may it reimburse him for damages or fines incurred. N.Y. Const. art. XIII § 13(a).

Clearly, the sheriff faces a Hobson's choice. He is caught between the Scylla of an absolute mandate from the court of appeals which he is compelled to obey or pay $5,000 damages for each inmate he accepts and the Charybdis of receiving all prisoners consigned to his custody by state law or face state court criminal contempt citations.[6]

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6. In advance of the Second Circuit's deadline for compliance with the population cap, the sheriff advised all judges of the Nassau County criminal (Cont'd)

The mischief attendant to permitting such a sanction against individuals who cannot bring about compliance is evident in the case presented by this petition and warrants a grant of certiorari.

III.

The mandate below is ambiguous and fails to establish meaningful guidelines necessary for the district court to impose the sanctions devised by the court of appeals.

The court of appeals' direction to the district court to "hold the county defendants in civil contempt . . . and to assess compensatory damages in favor of the plaintiffs of not less than $5,000 for each prisoner admitted to NCCC in violation of the amended consent judgment" *Badgley*, 800 F.2d at 39 (33a), is fatally flawed. The sheriff and the warden "have made every reasonable effort to comply with the directions in the decree and in particular with the order to keep the inmate population below the maximum of 710." (19a-20a) Consequently, fining them $5,000 for each prisoner admitted to NCCC will not have any coercive effect.

The award of "not less than $5,000" is also exceptional in

(Cont'd)
justice system that he would begin to reduce the prisoner population by progressively refusing to accept pre-trial detainees held in lieu of bail for traffic offenses, ordinance violations, "B" misdemeanors and "A" misdemeanors involving crimes against property. Implementation of this policy three days before the deadline triggered a spate of state court criminal contempt citations. The district court's extreme concern, expressed during a hearing on petitioners' motion for a protective order, had a salutory effect *pro tempore* on the state judiciary. However, on November 21, 1986, the administrative and supervising judges of Nassau County, represented by the New York State Office of Court Administration, commenced a third party action in state court to compel the sheriff to accept all prisoners.

that there has been no showing of actual damages. There is nothing in the record or the opinion of the Second Circuit to show that any member of the Badgley class, or the class as a whole, suffers $5,000 damages for each prisoner admitted to NCCC in violation of the decree. The "not less than $5,000" admission ticket sanction is completely arbitrary and lacks any correlation to demonstrable damages.

Furthermore, the direction to the district court lacks any legitimate nexus between the sanction imposed and the correction of any violation. In considering an analagous situation the Third Circuit held:

> There is no discernable connection between the sanction and any of the remedial features of the injunction in place. If the court had directed the County defendants to develop and implement a plan for alternative housing, there would be an obvious relationship between such an order and a monetary sanction for delay in compliance. Absent such a relationship, however, we are reluctantly constrained to hold that the December 30, 1983 order, insofar as it directed the defendants to pay $5,000 to the Clerk of the United States District Court for each released inmate, lacked a sufficiently specific nexus with the underlying violations and their correction so as to amount to an abuse of discretion.

Inmates of Allegheny County Jail v. Wecht, 754 F.2d 120, 129-30 (3d Cir. 1985).

Moreover, "the primary purpose of the imposition of a sanction for civil contempt is to coerce the contemnor into future compliance and to remedy past non-compliance, rather than to

punish him." *Matter of Dickinson*, 763 F.2d 84, 87 (2d Cir. 1985) (citations omitted). Since the sanction here is "compensatory", *Badgley*, 800 F.2d at 39 (33a), and no actual damages have been shown, it is nothing more than a punishment and beyond the scope of civil contempt. This is especially true for the sheriff who will be forced to pay the "not less than $5,000" sanction for each prisoner from his own pocket because he is prohibited from seeking indemnification. N.Y. Const. art. XIII, § 13(a).

Aside from the lack of connection between the compensatory damages and the remedial purposes of the decree, the court of appeals' mandate is silent on the mechanics of implementation. For example, the court of appeals did not specify to whom compensatory damages are to be paid or how such monies are to be distributed. In short, the district court was left to divine the Second Circuit's solution as to whether the inmate admitted in excess of the in-house population cap receives the $5,000 or greater damages, or whether the damages are to be distributed *pro rata* among the entire present inmate population or to the ever-changing (and ever-growing) plaintiff class.

Other problems with the mandate are increasingly likely to occur. For instance, what is the district court to do if the in-house population cap is exceeded for a matter of minutes while adjusting prisoner transfers are made by the warden to bring petitioners into compliance? Similarly, what is to be done when 40 or 50 drug-related offenders are picked up in a single night's coordinated raid?

Implementation of the mandate presents a constellation of problems for the district court, which, because of the order's vagueness, leaves the district judge without a sextant in an uncharted area. The absence of guidelines for implementation of the mandate warrants a grant of certiorari.

IV.

In the absence of issues involving fundamental constitutional guarantees, the actions of the court of appeals violated this Court's policy of judicial restraint toward the administration of local jails.

The principles of comity and federalism militate against needless interference in the management of correctional institutions. *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Bell v. Wolfish*, 441 U.S. 520 (1979). "These underlying and restrictive principles of comity and federalism are perhaps nowhere more compelling than in actions seeking relief against unconstitutional practices, policies and conduct manifest in state penal institutions." *Kendrick v. Bland*, 740 F.2d 432, 437 (6th Cir. 1984). "Federal judges must always be circumspect in imposing their ideas about civilized and effective prison administration on state prison officials" *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985) (citations omitted).

Since a court is usually ill-equipped to deal with the increasingly urgent problems of prison administration and reform, *Procunier v. Martinez*, 416 U.S. 396 (1974), judicial restraint and deference to those charged with operating local jails is counselled. As this Court held:

> [J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Bell v. Wolfish, 441 U.S. 520, 548 (1979) (citations omitted).

Recently, the Second Circuit appeared to recognize these principles. In contrast to its action in the present case, the court of appeals observed in *Dean v. Coughlin*, No. 86-2175, slip op. at 275-76 (2d Cir. 1986):

> We have repeatedly been cautioned (1) not to use a sledgehammer where a more delicate instrument will suffice, (2) not to move too quickly where it appears that the state, in the exercise of its administrative authority, will in its own way adopt reforms bringing its system into compliance with the Constitution, and (3) to give the state a reasonable opportunity to remedy a constitutional deficiency, imposing upon it a court-devised solution only if the state plan proves to be unfeasible or inadequate for the purpose. (citations omitted)

Unlike the "hard core" cases envisioned by the Second Circuit in *Dean*, there is here no constitutional deficiency to remedy and Nassau County has come forward with a reasonable plan; and the district court so found. In an ancillary motion for a stay of the mandate in the court of appeals, the petitioners supplied extensive documentary evidence detailing Nassau County's efforts to construct a new 300-bed modular facility adjacent to NCCC. That construction and a host of other programs, including bail review, electronic surveillance at home, and placement of temporary modular buildings at an annex facility, have all contributed to reducing the in-house population at NCCC.

The court of appeals' desire to force solutions for nettlesome local jail overcrowding problems propelled it into error. Given the unrestricted nature of the flow of inmates from the criminal justice system into NCCC, it was inappropriate to suspend draconian damage awards over the heads of petitioners who

themselves cannot affect the prison population. Apart from the plain fact that the mandate cannot accomplish its intended purpose, it will, in the case of the sheriff, unjustifiably subject him to financial ruin.

Because the mandate is a sledgehammer directed at the wrong parties, a writ of certiorari is warranted.

CONCLUSION

For these reasons a writ of certiorari should issue to review the mandate of the United States Court of Appeals for the Second Circuit in *Badgley v. Santacroce.*

Dated: New York, New York
November 24, 1986

Respectfully submitted,

JAMES M. CATTERSON, JR.
314 Main Street
Port Jefferson, New York 11777
(516) 473-1122

WILLIAM M. PAULEY III
SNITOW & PAULEY
415 Madison Avenue
New York, New York 10017
(212) 935-0833

Counsel for Petitioners

APPENDIX A—AMENDED CONSENT DECREE WITHOUT EXHIBITS ENTERED OCTOBER 9, 1984 BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

80 CIV. 2916 (JM)

HERBERT BADGLEY, J. BARNES, MITCHELL CHAPMAN, ROBERT GUNSBERG (a/k/a ROBERT ALIVINO), MAURICE McCORKLE, FRANK RICCHIUTI, OSCAR RODRIGUEZ and HENRY SMITH, inmates of the Nassau County Correctional Center and EUGENE CHAPMAN, LEE McCORKLE and KATHERINE RICCHIUTI, members of inmates' families, individually and on behalf of all persons similarly situated,

Plaintiffs,

-against-

THOMAS J. VARELAS, Sheriff of Nassau County; WALTER J. FLOOD, Warden of Nassau County Correctional Center; WILLIAM G. McMAHON, Chairman, New York State Commission of Correction; THOMAS A. COUGHLIN, III, Commissioner, New York State Department of Correctional Services, individually and in their official capacities,

Defendants.

AMENDED CONSENT DECREE

Plaintiffs having brought this class action challenging certain conditions of confinement at the Nassau County Correctional

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Center ("NCCC") as violative of the rights of all persons who are or will be incarcerated at NCCC; the plaintiffs and County defendants having entered a stipulation and agreement for proposed judgment on July 13, 1981, which the United States District Court for the Eastern District of New York adopted as its judgment on October 7, 1981; the District Court having ordered that said judgment be modified in certain respects on March 26, 1984; the plaintiffs having appealed that order to the United States Court of Appeals for the Second Circuit, which then reserved decision on the matter pending further compromise negotiations; and counsel on behalf of the plaintiff class and the County defendants having agreed that it is in the best interests of all parties that the issues raised herein be resolved without further litigation;

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiffs and County defendants and subject to approval by the Court that the issues raised herein have been and hereby are resolved as follows:

(1) This Consent Decree shall not constitute an admission by the County, a concession by the plaintiffs regarding constitutionality of conditions as set forth herein, or an adjudication by the Court on the merits of the allegations of the plaintiffs.

MAXIMUM CAPACITY

(2) On June 11, 1984 the Board of Supervisors of Nassau County authorized the expenditure of $17,500,000 for capital construction and renovations at NCCC. It is the intention of the County Executive and the Board of Supervisors to undertake a five (5) year construction program to include:

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A. A 100-300 bed medium security modular housing facility;

B. A multiple purpose building to provide space for programs and recreation, including a gymnasium for male and female inmates;

C. A new women's wing to house detained and sentenced females;

D. A medical unit sufficient to provide medical and medical related care for male and female inmates.

As among the construction projects described in subparagraphs B, C and D *supra*, the multiple purpose building described in sub-paragraph B shall be afforded priority in design and construction.

(3) County defendants have expanded the capacity of NCCC by construction of dormitory housing units in accord with specifications promulgated by the New York State Commission of Correction. With the completion of that dormitory housing, the maximum capacity of NCCC (excluding civil prisoners, who shall be housed outside of NCCC but may be placed at the Work Release Facility, provided that their placement at the Work Release Facility will not result in any decrease in participation in the Work Release Program) is as follows:

Existing Cells	622
Certified conference rooms	8
Newly constructed dormitory housing	157
Additional capacity acquired by double-celling as set forth herein	205
Total	992.

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(4) It is understood, however, that the actual maximum in-house population of NCCC shall not exceed 710* plus the number of inmates actually housed in the dormitories. The term "maximum in-house population" shall not include any inmate housed at the Work Release Facility or elsewhere outside of the existing maximum security facility. In the event that changes in the classification system permit an increase in the maximum prisoner capacity ("MPC") at NCCC, as that term is defined by the New York State Commission of Correction, such that the MPC exceeds the maximum in-house population established by this Decree, then the defendants may on notice to plaintiffs apply to this Court for modification of this Decree.

DOUBLE-CELLING

(5) Plaintiffs and County defendants hereby agree to the double-celling of detainees and sentenced prisoners subject to the terms and conditions set forth herein. It is understood that double-celling will be avoided whenever possible. To this end, Nassau County intends that the construction projects referred to in paragraph (2) above will minimize and eventually eliminate the conditions complained of. All plans which become public documents will be made available to counsel for the plaintiffs. If construction of the new women's wing has not commenced within three (3) years from the date of this Consent Decree or if the new women's wing is not completed within five (5) years from the date of this Consent Decree or if the County defendants have not undertaken to convert the existing women's section in

---

* This figure represents 85% of the bedspace, including second bunks, and conference rooms and other special housing units, in the existing core facility at NCCC excluding the newly constructed dormitories. It shall be reduced to 640 upon the removal of second bunks pursuant to paragraphs 5 and 14 herein.

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the core facility (pursuant to paragraph 14 herein) within five (5) years from the date of this Consent Decree, then either party shall have the right to apply to the Court on notice to determine whether continued double-celling on the E, F, G and H floors as specified herein meets constitutional standards.

Physical Layout of Double Cells	*Prior*	*Added*
E, F, G, H Floors - Added a second bed on each of the first five cells on each tier on each floor (16 tiers x 5 beds - total 80)		80
C & D Floors - Added second beds, as above (8 tiers x 5 beds - total 40)		40
B Floor		
B1 and B2 - Kept existing configuration (B1 front - 14, B1 rear - 4, B 2 - 20)	38	
B3 and B4 - Added a second bed in each of the first 5 cells on the long side, closest to lock box area, and a second bed in each of the first two cells on the short side (again closest to the lock box area)		14
A Floor		
A1 & A2 - Kept existing configuration (all cells double-celled)	27	
A3 & A4 - Added a second bed to each of the first three cells on each tier		6
Total prior double-celling	65	

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Total additional beds constructed	140
Total number of cells equipped for double-celling	205

Conditions of Double-Celling

(6) No detainee shall be double-celled in excess of 30 days during any continuous period of incarceration (defined so as to include transfers to and from other confinement within NCCC or the Nassau County Medical Center).

(7) No inmate shall be double-celled in excess of 45 days during any continuous period of incarceration (defined so as to include transfers to and from other confinement within NCCC or the Nassau County Medical Center). Inmates who return to NCCC after spending 60 days in the Work Release Facility, the Nassau County Medical Center or other correctional facilities may be confined up to a maximum of 30 days in a double cell.

(8) No inmate shall be double-celled in excess of 72 hours on any of the following tiers during any continuous period of incarceration (defined so as to include transfers to and from other confinement facilities both within and without the jurisdiction) when the population of such tier exceeds the following:

A1 (Front)	- 9
A1 (Rear)	- 7
A2	- 19
B1 (Front)	- 18
B1 (Rear)	- 7
B2	- 25

(9) No inmate shall be introduced into the general population

of NCCC or confined in excess of 48 hours or double-celled without having received an examination by a physician, a nurse or medically trained technician operating under the direction of a physician, with specific instructions as to when the physician is to be consulted. Such examination shall include, any tests required in the opinion of the physician to identify and isolate those who have communicable diseases. This requirement shall not apply to newly admitted inmates for whom there is a record of a medical examination having been performed within the three month period prior to admission.

(10) No inmate shall be double-celled in a cell which does not contain a sink and toilet, adequate lighting for each bunk, two shelves, two Gibson foot lockers or equivalent for storage, and adequate ventilation and air circulation.

(11) Active supervision, as defined in 9 NYCCR § 7003.2(b)(1), shall be provided for all double-celled inmates.

(12) Under normal operating conditions, unless otherwise requested, no double-celled inmate shall be locked in other than at night during sleeping periods, and all double-celled cells shall remain open during the day and evening hours and every inmate shall have access to the exercise area. All double-celled inmates, with the exception of those on E, F, G and H floors, shall have access to a dayroom seven days each week.

Construction contracts are being let for the air conditioning work and new windows which will permit the use of all existing dayrooms. The County defendants shall make best efforts to assure that this work is completed at the earliest possible time. It is expected that this project will be completed within one year.

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(13) Subject to the limitations imposed by required classification, County defendants shall double-cell first in those cells equipped for double-celling located in tiers which have dayrooms.

(14) It is the intention of the County defendants to convert and utilize the existing women's section to detain male prisoners upon the completion and occupation of the new women's wing. Within thirty (30) days after the existing women's section is occupied by male prisoners, the County defendants shall remove second bunks from E, F, G and H floors in such numbers as equal the number of single cells made available by the utilization of the present women's section. It is the intention of the parties hereto that the number of bunks thus removed shall equal the number of cells made available to the County defendants by reason of the conversion of the present women's section to house male inmates.

(15) Except for valid medical purposes the use of cots on all tiers shall be discontinued.

(16) Conference rooms shall not be used for housing inmates except when an inmate having been offered housing in a protective custody unit suitable for his statutory classification voluntarily elects instead the additional security of a conference room and such is approved by the County defendants or by their representatives. It is understood that a request for protective custody under any other circumstances may not be construed as a request to be housed in a conference room.

(17) The room located in the south ground lobby of the Correctional Center shall be used to house inmates only under exceptional circumstances and only for the temporary housing of an inmate for a period of less than 24 hours.

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PROTECTIVE CUSTODY

(18) County defendants shall maintain protective custody units of sufficient size to afford protective custody in single cells to all inmates who require such confinement. Such protective custody units shall be used exclusively for those inmates who voluntarily request such custody or who are placed there by court order and have been approved by officials at NCCC.

CONTACT VISITS

(19) The policy of NCCC is and shall continue to be to afford at least three one hour visits each week to each inmate where practicable. A program of Saturday visitation shall be planned immediately and shall be implemented when necessary to afford at least three one hour visits each week to each inmate. When three one hour visits can be afforded during any week, the County defendants need not conduct Saturday visitation that week. The Saturday visitation program may be terminated by the County defendants on notice to plaintiffs' counsel when visitation can be accommodated during the week.

FOOD SERVICE

(20) Food service shall be provided to the inmate population on an individual portion basis as soon as possible. Under normal operating conditions, inmates will not be locked into their cells during mealtime except as provided in the September 20, 1984 order of the Supreme Court, Nassau County (Molloy, J.) in *People ex rel. Schipski v. Flood* (index nos. 2381/80, 1236/80, 3496/80 and 51536/80).

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RECREATION

(21) Recreational services shall be provided in accordance with the regulations set forth by the New York State Commission of Correction and the recreation program shall be expanded to meet the needs of the increased population level. All newly constructed housing units shall have their own outdoor recreation areas. Women's outdoor recreation shall not be held in the "covered" area adjacent to the present women's housing area. This area shall be renovated and made suitable for women's indoor recreation pending completion of the new women's wing. It is expected that this project will be completed by the winter of 1984. Pending completion of the multiple purpose building, when inclement weather does not permit outdoor recreation, maximum use shall be made of the indoor facilities during all lock-out hours. Best efforts shall be made to minimize conflict between schedules for recreation and other programs. Current recreation schedules shall be supplied to plaintiffs' counsel.

LAW REFERENCE LIBRARY

(22) Within sixty (60) days after the execution of this Agreement the hours of operation of the Inmates' Law Reference Library shall be expanded by 28 hours per week in accordance with the proposed schedule dated May 14, 1984 attached hereto, or a comparable schedule devised by the County defendants, a copy of which shall be provided to plaintiffs' counsel. Law library facilities shall be included in the newly constructed housing units. Records shall be maintained of all those who request access each day, both in the law library(s) and on each tier's Inmate Daily Activity Request Form. Additional records shall be maintained in the law library(s) of all those who are given access to the law library(s), their period of actual attendance and whether they

requested recall in the event the period of actual attendance was less than two hours.

RECREATIONAL LIBRARY AND PROGRAMS

(23) Nassau County shall repair and open the Inmates' Recreational Library and shall institute a recreational library program. At such time as the recreational library is reopened, current schedules of its hours of operation shall be supplied to plaintiffs' counsel.

Program space shall be made available in the newly constructed housing units and best efforts shall be made to maintain the Work Release Program.

MEDICAL AND PSYCHIATRIC SERVICES

(24) Medical services including psychiatric services shall be maintained at the facility in accordance with the requirements and regulations of the New York State Commission of Correction. "Sick call" as presently available to male inmates shall be provided to both male and female inmates at least five (5) days per week.

TELEPHONES

(25) The County defendants shall make all efforts to improve or expand telephone service provided for inmate use. Effective immediately, defendants shall request immediate repair of any broken telephone. Provisions will be made for all inmates on any tier with a broken telephone to place at least two three minute or one six minute call per week.

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ATTORNEY VISITING

(26) Existing space and facilities to accommodate attorney visits in the Correctional Center shall not be diminished, although the County defendants shall have the right to relocate and reallocate existing space to accommodate this purpose. Additional and adequate attorney visiting areas shall be included in the housing units to be constructed.

STAFFING

(27) County defendants shall provide adequate staff to fully and timely implement each and every provision of this agreement.

REPORTING REQUIREMENTS

(28) The County defendants shall file quarterly reports with the County Executive and the County Attorney with copies to counsel for the plaintiffs briefly summarizing the progress of the construction projects referred to hereinabove. The County defendants shall make available to the County Attorney and plaintiffs' counsel inmate population statistics once every week and the "'Badgley printout" once every two weeks for a period of five (5) years.

RETENTION OF JURISDICTION

(29) Plaintiffs hereby agree to withdraw their appeals from the March 26, 1984 Orders of the District Court to the United States Court of Appeals for the Second Circuit, and will execute and file such stipulations and applications as are necessary to effect such end.

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(30) This Court shall retain jurisdiction over the provisions of this Consent Decree and any questions concerning its implementation or interpretation will be referred to the Court for resolution. At any time after five (5) years from the date of entry of this Decree, any party may on notice move this Court for a dissolution of the Consent Decree upon a showing that the Decree has been complied with in all material respects and there is no further substantial need for the Court to retain jurisdiction.

(31) The orders of District Judge Jacob Mishler filed on March 23, 1984 and amended on March 26, 1984 are hereby incorporated in this Consent Decree as follows:

> ORDERED that the defendant Thomas J. Varelas, Sheriff of Nassau County, or his successor, shall not deliver any persons to NCCC on or after this date whether such person is a sentenced inmate, pre-trial inmate or in any other status, until such time as the maximum in-house population of NCCC is no more than 710 plus the number of inmates actually housed in the dormitories, and thereafter shall not deliver such persons to NCCC where such delivery will increase the in-house population above 710 inmates, excluding those inmates actually housed in the dormitories, and it is further
>
> ORDERED that the defendant Walter J. Flood, Warden of NCCC, or his successor, shall not accept any persons at NCCC on or after this date whether such person is a sentenced inmate, pre-trial inmate or in any other status, until such time as the maximum in-house population of

NCCC is no more than 710 plus the number of inmates actually housed in the dormitories; and it is further

ORDERED that if at any time hereafter the maximum in-house population reaches 685 or more, excluding the inmates actually housed in the dormitories and other areas outside the core facility, and continues for a period of five (5) consecutive days, the Warden shall send notice of the status of the population to the administrative judges of the Nassau County Supreme Court, County Court, District Court, Family Court, and any other federal, state or local governmental agencies that send prisoners to NCCC for confinement.

(32) Defendants may accept persons charged with class A or B felonies under the Penal Law of the State of New York and other persons charged with serious crimes who are remanded to their custody without bail or bail equal to or exceeding the sum of $100,000 without regard to the in-house population cap.

(33) To the extent that any prior orders or decrees are inconsistent with the provisions of this Consent Decree they are hereby rescinded and this Consent Decree is intended to govern all of the rights and obligations between the parties. Nothing herein is intended to preclude any party from moving to enforce or modify the terms of this Consent Decree.

DATED: Mineola, New York
Oct. 9, 1984

Appendix A

SO ORDERED:

s/ Jacob Mishler
United States District Judge

CONSENTED TO ON BEHALF OF THE PLAINTIFFS:
s/ Matthew Muraskin
MATTHEW MURASKIN
Attorney for Plaintiffs
Attorney in Chief
Legal Aid Society
33 Willis Avenue
Mineola, New York 11501

CONSENTED TO ON BEHALF OF THE
COUNTY DEFENDANTS:
s/ Edward McCabe
EDWARD G. McCABE
Nassau County Attorney
One West Street
Mineola, New York 11501

s/ James M. Catterson, Jr.
JAMES M. CATTERSON, JR.
Special Counsel to Nassau County
314 Main Street
Port Jefferson, New York 11777

Appendix A

s/ William H. Pauley, III
WILLIAM H. PAULEY, III
Special Counsel to Nassau County
Orenstein Snitow & Pauley, P.C.
750 Third Avenue
New York, New York 10017

s/ Thomas J. Varelas
THOMAS J. VARELAS
Sheriff of Nassau County

s/ Saul A. Jackson
SAUL A. JACKSON
Nassau County Commissioner of Corrections

s/ Walter J. Flood
WALTER J. FLOOD
Warden
Nassau County Correctional Center

APPENDIX B—MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED JANUARY 6, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 80-2916

HERBERT BADGLEY, J. BARNES, MITCHELL CHAPMAN, ROBERT GUNSBERG (a/k/a ROBERT ALIVINO), MAURICE McCORKLE, FRANK RICCHIUTI, OSCAR RODRIGUEZ and HENRY SMITH, inmates of the Nassau County Correctional Center and EUGENE CHAPMAN, LEE McCORKLE and KATHERINE RICCHIUTI, members of inmates' families, individually and on behalf of all persons similarly situated,

Plaintiffs,

-against-

THOMAS J. VARELAS, Sheriff of Nassau County; WALTER J. FLOOD, Warden of Nassau County Correctional Center; WILLIAM G. McMAHON, Chairman, New York State Commission of Correction; THOMAS A. COUGHLIN, Commissioner, New York State Department of Correctional Services, individually and in their official capacities,

Defendants.

January 6, 1986

Appendix B

APPEARANCES:

Morton J. Marshack, Esq.
Nassau County Legal Aid Society
Criminal Division
33 Willis Avenue
Mineola, New York 11501

Honorable Edward G. McCabe
County Attorney of Nassau County
One West Street
Mineola, New York 11501

James M. Catterson, Jr., Esq.
Special Attorney for Nassau County
314 Main Street
Port Jefferson, New York 11777

William H. Pauley, III, Esq.
Snitow & Pauley, P.C.
415 Madison Avenue
New York, New York 10017

David Smith, Esq.
Assistant Attorney General
Nassau Regional Office of the New York State
Attorney General
190 Willis Avenue
Mineola, New York 11501

MISHLER, District Judge

Plaintiffs move for an order holding the Sheriff of Nassau

Appendix B

County and the Warden of the Nassau County Correctional Center ("NCCC") in contempt of court for violation of paragraph 31 of the Amended Consent Decree dated October 9, 1984 in that the inmate population of the core facility of the NCCC exceeded the maximum of 710 inmates.[1]

The material facts are not in dispute. Throughout the summer and to the present time the number of inmates in the core facility has frequently exceeded 710. During the period from October 7 to and including November 22, the facility was in compliance on three days: October 8—705, October 24—706, October 25—710. The fluctuation in population increases and decreases the number significantly from day to day, e.g., November 18—748, November 19—714, November 20—720, November 21—739, November 22—743.

The breakdown by classification of the inmates shows that approximately 85% are held in default of bail pending trial on felony charges in the Nassau County Court or held pending hearing on charges of violation of parole subsequent to release from state institutions. Approximately 10% to 12% of the inmates are serving sentences on misdemeanor convictions—75 to 80 inmates. "State readies" (inmates sentenced on felony convictions to state institutions awaiting processing as to designation of an institution) comprise a small number of the inmate population—approximately 2% or 14-15.

DISCUSSION

The Sheriff of Nassau County and the Warden of NCCC have demonstrated by clear and convincing evidence that since the effective date of the Amended Consent Decree they have made every reasonable effort to comply with the directions in the decree

and in particular with the order to keep the inmate population below the maximum of 710. We find that it is impossible for them to comply with the decree without the assistance of the state officials. *United States v. Rylander*, ____ U.S. ____, 103 S. Ct. 1548, 1552 (1983). The Sheriff has the statutory duty of delivering inmates charged with felonies to the NCCC and the Warden the statutory duty to receive them and keep them in custody pending trial. Their failure to maintain less than 710 inmates in the core facility was not a willful disobedience of the decree. *In re Weiss*, 703 F.2d 653, 660 (2d Cir. 1983).

The State of New York has the power to relieve the overcrowding at the NCCC. The conditions at the NCCC are symptomatic, to a degree, of the overcrowded conditions in the state institutions—in fact of jail conditions nationally. Plaintiffs urge that the court direct that the release date of misdemeanants serving sentences in the core facility be advanced to relieve the overcrowding. The NCCC houses approximately 75 misdemeanants in the core facility. In order to bring the number of inmates below 710, the release of about 30 inmates may be required. The reduction of sentences (some sentences are for only one month) by advancing the release dates would seem to be an unwarranted intrusion in the administrative authority of the NCCC and the state criminal judicial process.

The nub of the problem lies in the number of inmates confined to the core facility awaiting trial on felony charges in the Nassau County Court and those awaiting hearings on charges of parole violation—approximately 620 to 630. The District Attorney of Nassau County and the Administrative Judge of the Nassau County Court have turned their attention to the problem before us and will make an effort to give priority to the trial of cases involving inmates in the core facility. The County also plans to

expand the core facility by converting space formerly used as a mess hall into a dormitory unit. It is estimated that this will increase the capacity of the core facility by 40 beds.[2]

The Amended Consent Decree is not based on a constitutional violation. *See Badgley v. Varelas*, 729 F.2d 894, 899 (2d Cir. 1984). This court lacks the power to prevent state officials from violating the constitutional rights of inmates under the decree.[3] *Green v. Mansour, Director Michigan Dep't of Social Services*, 54 U.S.L.W. 4011 (U.S. December 3, 1985) (*Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908) held "that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Id.* at 4013); *Pennhurst State School & Hospital v. Halderman*, ____ U.S. ____, 104 S. Ct. 900, 909 (1984); *Barnes v. Cohen*, 749 F.2d 1009, 1019 (3d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 2126 (1985).

The court invites the parties to make further application for a program or procedure to reduce the number of inmates in the core facility in the event the efforts of the Nassau County District Attorney and the Nassau County Administrative Judge fail to significantly reduce the inmate population. In such event, upon a showing that state officials are violating the constitutional rights of the inmates, the court will consider appropriate measures to insure compliance with the decree.

The motion to punish the Warden and Sheriff of Nassau County for contempt is denied, and it is

SO ORDERED.

s/ Mishler
U.S.D.J.

Appendix B

FOOTNOTES

1. Paragraph 31 of the decree ordered the Sheriff not to deliver any inmate to the NCCC after the date of the decree to the core facility "until such time as the maximum in-house population of [the core facility of] NCCC is no more than 710."

The core facility is used to house high risk inmates who are under sentence for misdemeanors, "state readies," inmates charged with violation of parole and inmates who are in custody pending trial in default of bail on misdemeanor and felony charges. In fixing the maximum population for the core facility at 710, a footnote to paragraph 4 of the decree states in pertinent part:

> The figure represents 85% of the bedspace, including second bunks, and conference rooms, and other special housing units, in the existing core facility at NCCC.

2. The court has received notice that the New York State Commission of Correction approved the use of the space to establish a 40 bed dormitory unit.

3. The Chairman of the New York State Commission of Correction and the Commissioner of the Department of Correctional Services of the State of New York have been named defendants since the inception of this lawsuit. Plaintiffs have not proceeded against them.

APPENDIX C—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED AUGUST 25, 1986

Herbert BADGLEY, James Barnes, Mitchell Chapman, Robert Gunsberg (a/k/a Robert Alvino), Maurice McCorkle, Frank Ricchiuti, Oscar Rodriguez and Henry Smith, inmates of the Nassau County Correctional Center, and Eugene Chapman, Lee McCorkle and Katherine Ricchiuti, members of inmates' families, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

v.

Joseph J. SANTACROCE, Sheriff of Nassau County; Walter J. Flood, Warden of Nassau County Correctional Center; William G. McMahon, Chairman, New York State Commission of Correction; Thomas A. Coughlin, Commissioner, New York State Department of Correctional Services, individually and in their official capacities,

Defendants-Appellees.

No. 1062, Docket 86-2035

United States Court of Appeals,
Second Circuit.

Argued May 29, 1986.

Decided Aug. 25, 1986.

Before FEINBERG, Chief Judge, and NEWMAN and KEARSE, Circuit Judges.

Appendix C

JON O. NEWMAN, Circuit Judge:

More that two years ago, this Court characterized as a "disaster" the persistent violation by the Nassau County Sheriff and the Warden of the Nassau County Correctional Center ("NCCC") of a consent judgment limiting inmate population at the NCCC. *Badgley v. Varelas*, 729 F.2d 894, 902 (2d Cir. 1984) ("*Badgley I*"). We now confront a situation of continuing violation of an amended consent judgment and discover that, since we last saw this case, little if any meaningful action has been taken to alleviate the overcrowding at the NCCC. The current situation must now be remedied—promptly and effectively. On this appeal by inmates of the NCCC from the judgment of the District Court for the Eastern District of New York (Jacob Mishler, Judge), which denied the inmates' motion to hold the county defendants in civil contempt, we conclude that the District Court erred in finding that compliance with the terms of the amended consent judgment was impossible. We therefore reverse and remand the case to the District Court with instructions to enforce the provisions of the amended consent judgment for ensuring compliance with the judgment's population limit.

Background

This appeal is the latest episode in a Dickensian saga of prison overcrowding and bureaucratic excuse and delay. The complex early history of this litigation, from the filing of a suit in 1980 by NCCC inmates seeking a declaration that conditions at the jail violated their constitutional rights, to late 1983, is recounted in our decision in *Badgley I*, familiarity with which is assumed. That decision considered various orders entered by the District Court to implement a consent judgment, signed by the Sheriff and the Warden in 1981, which provided for a maximum

population of 808 at the NCCC. We instructed the District Court to enforce that judgment by enjoining the county defendants from accepting any person for confinement at the NCCC until the inmate population had been reduced to 808 and thereafter from accepting any person, if that person would increase the population above 808. 729 F.2d at 902.

On March 13, 1984, the District Court complied with our mandate and issued a remedial order prohibiting intake of inmates over the population maximum. The county defendants moved to recall our mandate and to extend the remedial order's effective date. We denied the motion. The county defendants then moved to modify the judgment, requesting an increase in the population maximum and seeking authority to accept the most serious offenders, those charged with class A or B felonies and those held without bail or with bail of $100,000 or more, without regard to the population cap. After holding a hearing, the District Court rendered a decision that, among other things, increased the population limit to 900. While an appeal from that decision was pending, the parties negotiated an agreement to amend the consent judgment. We remanded to permit the District Court to consider the new agreement. An amended consent judgment was approved by Judge Mishler on October 9, 1984.

The amended consent judgment slightly increases the inmate population limit and also incorporates an enforcing mechanism. Paragraph 4 provides that "the actual maximum in-house population of the NCCC shall not exceed 710 [the maximum allowable in cells] plus the number of inmates actually housed in [newly constructed] dormitories." Paragraph 3 establishes the maximum capacity of the new dormitory housing as 157. Thus, the judgment contemplates a maximum in-house population of 867. Paragraph 31 incorporates, with appropriate numerical

adjustments, the remedial provisions ordered by the District Court in March 1984 in conformity with *Badgley I*: The Sheriff of Nassau County must not deliver any person to the NCCC until the in-cell population is no more than 710 and must not deliver any person who would increase the population above 710, the Warden of the NCCC must not accept any person until the in-cell population is no more than 710, and the Warden must notify all courts and agencies that send prisoners to the NCCC for confinement any time the in-cell population equals or exceeds 685 for five consecutive days. Paragraph 32 allows the defendants to accept, "without regard to the in-house population cap," persons charged with class A or B felonies and persons held without bail or with bail of $100,000 or more.

Beginning on October 7, 1985, the county defendants began housing inmates at the NCCC above the in-cell limit of 710. Since that time, the defendants' record of compliance with the amended consent judgment has been abysmal. Paragraph 28 of the judgment requires the defendants to provide plaintiffs with weekly inmate population statistics. A review of the statistics for weekday population between October 7, 1985, and March 28, 1986[1] reveals that the in-cell maximum was met on only fifteen days. The average daily in-cell population at the NCCC was 732 for November, 712 for December, 746 for January, 739 for February, and 751 for March. On March 17, 1986, the in-cell population rose to a high of 781; that same day, the total in-house population (including

1. Obviously, population figures for the period after the District Court's decision were not before the District Court. However, these figures, provided in accordance with the terms of the amended consent judgment, are useful both to illustrate the magnitude of the problem at the NCCC and to belie the county defendants' contention, in an affidavit filed in opposition to plaintiffs' contempt motion, that instances of overcrowding in violation of the amended consent judgment are "isolated."

inmates in dormitories) was 961. Overcrowding in violation of the amended consent judgment has been the rule and compliance the rare exception.

On October 17, 1985, the plaintiffs moved for an order holding the county defendants in contempt of court for violation of paragraph 31 of the amended consent judgment. After a series of hearings, the District Court on January 6, 1986, concluded that the county defendants had not willfully violated the judgment, that they had made every reasonable effort to comply with the population limit, and that it was impossible for them to comply with the judgment without the assistance of state officials. The Court therefore denied the contempt motion, and the inmates appealed. We now reverse.

Discussion

The purpose of civil contempt, broadly stated, is to compel a reluctant party to do what a court requires of him. Because compliance with a court's directive is the goal, an order of civil contempt is appropriate "only when it appears that obedience is within the power of the party being coerced by the order." *Maggion v. Zeitz,* 333 U.S. 56, 69, 68 S.Ct. 401, 408, 92 L.Ed. 476 (1948). A court's power to impose coercive civil contempt is limited by an individual's ability to comply with the court's coercive order. *Shillitani v. United States,* 384 U.S. 364, 371, 86 S.Ct. 1531, 1536, 16 L.Ed.2d 622 (1966); *Maggio v. Zeitz, supra,* 333 U.S. at 72-73, 68 S.Ct. at 409-10. A party may defend against a contempt by showing that his compliance is "factually impossible." *United States v. Rylander,* 460 U.S. 752, 757, 103 S.Ct. 1548, 1552, 75 L.Ed.2d 521 (1983). In raising this defense, the defendant has a burden of production, *id.,* that may be difficult to meet, *see Natural Resources Defense Council, Inc. v. Train,*

510 F.2d 692, 713 (D.C.Cir.1975); *Aspira of New York, Inc. v. Board of Education,* 423 F.Supp. 647, 654 (S.D.N.Y.1976), particularly in cases such as this where the defendants have a long history of delay and the plaintiffs' needs are urgent, *cf. Fortin v. Commissioner of Massachusetts Department of Public Welfare,* 692 F.2d 790, 797 (1st Cir. 1982).

A classic application of the factual impossibility defense arises when a court orders an individual to produce documents that are not in his possession or control. *See United States v. Rylander, supra; Falstaff Brewing Corp. v. Miller Brewing Co.,* 702 F.2d 770, 781 (9th Cir. 1983). Similarly, a witness who refuses to answer a grand jury's questions cannot be held in contempt after the term of the grand jury expires, since it is no longer possible for the witness to purge himself of the contempt by testifying. *See Shillitani v. United States, supra.* And an inability to comply with an order requiring the payment of money because of poverty or insolvency will generally be a defense to contempt. *See In re Sobol,* 242 F. 487, 489 (2d Cir. 1917); *Securities Investor Protection Corp. v. Executive Securities Corp.,* 433 F.Supp. 470, 473 (S.D.N.Y.1977). In all these situations, the contempt is excused because compliance is literally impossible and, as a result, any attempts at coercion are pointless.

By contrast, on the undisputed facts of this case, nothing makes it factually impossible for the Sheriff to cease delivering persons to the NCCC or for the Warden to refuse to accept such persons until the population requirements of the amended consent judgment are met. As we noted in *Badgley I,* 729 F.2d at 902, if a natural disaster such as fire or disease required the NCCC to be closed, the county defendants would place the inmates elsewhere and would not deliver or accept new prisoners until the crisis ended. The continued violation of the amended consent

judgment is a legal crisis of equal gravity, and it is obvious that the defendants are just as able to decline to deliver and accept new prisoners until this crisis is ended. The terms of the amended consent judgment automatically operate, whenever the population limit is exceeded, to close the jail's doors as tightly as would fire or disease.

The specific difficulties of compliance asserted by appellees do not justify a finding of impossibility. The county defendants seemed to acknowledge at oral argument that compliance is hindered by political difficulties rather than physical impossibilities. Though cooperation between state and county authorities might well contribute to a resolution of the problems faced by the County, the political difficulties do not make it impossible for the defendants to stop adding more prisoners at the NCCC.

In the District Court the defendants suggested that compliance might violate state law. However, it is not at all clear that the Sheriff and the Warden must violate New York law to comply with the judgment. The New York Court of Appeals has ruled that prison overcrowding renders a jail sufficiently unsafe to justify an application to state authorities for an alternative place for confinement of inmates under New York Correction Law § 504(1) (McKinney Supp.1986). *See Adams v. Meloni,* 63 N.Y.2d 868, 870, 482 N.Y.S.2d 469, 470-71, 472 N.E.2d 319, 320-21 (1984). Section 504(1) requires the State Commission of Correction to designate an alternate site upon application. The county defendants do not contend that designation of an alternate place to house inmates has ever been sought and denied. Thus, the defendants seem to have available a course of action that would allow them to comply with both the amended consent judgment and state law.

The defendants also suggested to the District Court that

compliance might place them in contempt of the state courts that send them prisoners. Justice Arthur D. Spatt, Administrative Judge for Nassau County, told the District Court that, if the Sheriff refused to accept prisoners committed to his custody by local criminal courts, he would be in contempt of those courts. Significantly, however, he added that state judges do not commit prisoners to specific facilities and would not direct the Sheriff to take prisoners to the NCCC in light of the federal court's order barring delivery and acceptance of additional inmates. Compliance with the amended consent judgment has not been shown to pose a risk of contempt of state courts.

Even if a state court would hold the defendants in contempt for refusing to house inmates at the NCCC, or if compliance would otherwise violate state law, Supremacy Clause considerations require that the judgment of the federal court be respected. *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, 695, 99 S.Ct. 3055, 3079, 61 L. Ed.2d 823 (1979); *see Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); *Ableman v. Booth,* 21 How. (62 U.S.) 506, 16 L.Ed. 169 (1859). In any attempt by a state court to hold defendants in contempt for taking actions required by the judgment of the District Court, that judgment would provide a complete defense.

The respect due the federal judgment is not lessened because the judgment was entered by consent. The plaintiffs' suit alleged a denial of their constitutional rights. When the defendants chose to consent to a judgment, rather than have the District Court adjudicate the merits of the plaintiffs' claims, the result was a fully enforceable federal judgment that overrides any conflicting

state law or state court order.[2] The strong policy encouraging settlement of cases requires that the terms of a consent judgment, once approved by a federal court, be respected as fully as a judgment entered after trial.[3]

Appellees argue that we should not substitute our conclusions for those of the District Court because the District Court's finding of impossibility is supported by substantial evidence and is not clearly erroneous. It is true that the District Court's finding of impossibility is based on certain findings, for example, that compliance would violate state law. That finding is not one of fact and, as we have suggested, may well be incorrect. In any event, the District Court's conclusion that its findings are sufficient to prove impossibility of compliance is a legal ruling not entitled to a deferential standard of review. Because it is not impossible, as that term is used in the law of civil contempt, for the defendants to comply with the amended consent judgment, the District Court's finding to the contrary is incorrect as a matter of law and must be reversed.

---

2. In a somewhat analogous context, though not involving the Supremacy Clause, two related cases have held the federal interest superior to that of a foreign sovereign in rejecting an impossibility defense that compliance with an IRS summons would violate a foreign court's injunction. *See United States v. Chase Manhattan Bank, N.A.*, 590 F.Supp. 1160 (S.D.N.Y. 1984); *Garpeg, Ltd. v. United States*, 588 F.Supp. 1240 (S.D.N.Y.1984). The District Courts, though according great weight to the foreign sovereign's "vital interests," 590 F.Supp. at 1162 n.3, nevertheless found the federal interest dominant and held the non-complying party in civil contempt.

3. The Supreme Court has recently held that a consent judgment enables a federal court to adopt remedial measures broader than those available after a trial. *See Local 93, International Association of Firefighters v. City of Cleveland*, ___ U.S. ___, ___, 106 S.Ct. 3063, 3076-77, 92 L.Ed.2d 405 (1986).

Appendix C

Finally, we note that some clarification must be made concerning the meaning of paragraph 32 of the amended consent judgment, which allows the county defendants to accept, "without regard to the in-house population cap," persons charged with class A or B felonies and persons held without bail or with bail of $100,000 or more. The defendants have suggested that this provision not only entitles them to accept such persons without regard to the population limit but also to disregard them entirely in implementing the remedial provisions of the judgment. In the defendants' view, acceptance of such inmates, once the jail population is at or above the specified limit, would automatically effect a permanent increase in the limit. Upon reviewing the record, we find that this reading is irrational and could not possibly reflect the intent of the parties in drafting paragraph 32. Correctly read, the provision simply allows the Sheriff to deliver and the Warden to accept a certain class of persons even if their presence at the NCCC will *temporarily* increase the inmate population over the judgment's maximum limit. Once accepted, however, these persons must be counted in the jail's population, and no additional persons (other than those allowed by paragraph 32) may be accepted until the NCCC population has fallen below the maximum limit.

Conclusion

Compliance with the amended consent judgment must now occur, and the remedial provisions of that judgment must be put into effect. We will allow a delay of thirty days only to permit necessary notification to the appropriate court, agency, and police officials.

The judgment of the District Court is reversed, and the cause is remanded with directions to enter forthwith an order (1) declaring paragraph 31 of the amended consent judgment to be

operative thirty days after the date of this Court's decision and (2) requiring the county defendants promptly to give notice to all courts, police departments, and other federal, state, and local governmental agencies that send persons for confinement at the NCCC that, thirty days after the date of this Court's decision, the NCCC will be unavailable to house additional persons, except to the extent permitted by paragraph 32. The District Court is also directed to hold the county defendants in civil contempt in the event of any subsequent failure to implement paragragh 31 of the amended consent judgment and, in that event, to assess compensatory damages in favor of the plaintiffs of not less than $5,000 for each person admitted to the NCCC in violation of the amended consent judgment and to order any additional remedies that may be appropriate. The mandate of this Court shall issue forthwith.

APPENDIX D—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED SEPTEMBER 23, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of September one thousand nine hundred and eighty-six.

Present: HONORABLE WILFRED FEINBERG,
Chief Judge,
HONORABLE JON O. NEWMAN,
Circuit Judge.

86-2035

HERBERT BADGLEY, ET AL.,

Plaintiffs-Appellants,

v.

JOSEPH J. SANTACROCE, Sheriff of Nassau County, ET AL.,

Defendants-Appellees.

ORDER

Defendants-appellees Santacroce and Flood having filed a motion on September 22, 1986, to recall the mandate of this Court issued August 25, 1986, and to stay said mandate for thirty days, and

Appendix D

The plaintiffs-appellants having notified the Court of their intention to file opposition papers,

It is hereby ORDERED that the mandate issued by this Court on August 25, 1986, is hereby recalled, and the mandate is stayed until 5:00 p.m. September 25, 1986, to permit this Court an opportunity to consider the papers of all parties with respect to the motion for a thirty-day stay of the mandate. This order is conditioned upon the good-faith implementation by the defendants-appellees of all of the commitments and representations set forth in their motion papers and in the affidavits attached thereto.

s/ Wilfred Feinberg
WILFRED FEINBERG,
Chief Judge

s/ Jon O. Newman
JON O. NEWMAN,
Circuit Judge.

APPENDIX E—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED SEPTEMBER 25, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of September one thousand nine hundred and eighty-six.

Present: HONORABLE WILFRED FEINBERG,
Chief Judge,
HONORABLE JON O. NEWMAN,
Circuit Judge.

86-2035

HERBERT BADGLEY, ET AL.,

Plaintiffs-Appellants,

v.

JOSEPH J. SANTACROCE, Sheriff of Nassau County, ET AL.,

Defendants-Appellees.

ORDER

The mandate of this Court issued August 25, 1986, having been recalled by an order filed September 23, 1986, and issuance of the mandate having been stayed by that order until 5:00 p.m. September 25, 1986, and the Court having been informed that

counsel for the parties are continuing to confer on steps to implement the requirements of the amended consent judgment entered October 9, 1984,

It is hereby ORDERED that the mandate of this Court is further stayed until 5:00 p.m. September 29, 1986. This order is conditioned upon the good-faith implementation by the defendants-appellees of all of the commitments and representations set forth in their motion papers filed September 22, 1986, and in the affidavits attached thereto. Since the recall of our mandate restores to this Court jurisdiction only with respect to the January 6, 1986, ruling of the District Court declining to hold the defendants-appellees in civil contempt and with respect to the supplemental directions contained in our opinion issued August 25, 1986, recall of our mandate shall not be construed to divest the District Court of jurisdiction to entertain and adjudicate any requests for relief by any party to implement or take steps in aid of implementation of the October 9, 1984, amended consent judgment.

s/ Wilfred Feinberg
WILFRED FEINBERG,
Chief Judge

s/ Jon O. Newman
JON O. NEWMAN,
Circuit Judge.

APPENDIX F—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED SEPTEMBER 29, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of September one thousand nine hundred and eighty-six.

Present: HONORABLE WILFRED FEINBERG,
Chief Judge,
HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

86-2035

HERBERT BADGLEY, ET AL.,

Plaintiffs-Appellants,

v.

JOSEPH J. SANTACROCE, Sheriff of Nassau County, ET AL.,

Defendants-Appellees.

ORDER

The stay of mandate previously issued on September 23, 1986, and extended on September 25, 1986, is hereby further extended until 5:00 p.m. October 6, 1986, on the same terms and conditions

set forth in the prior stay orders.

s/ Wilfred Feinberg
WILFRED FEINBERG,
Chief Judge

s/ Jon O. Newman
JON O. NEWMAN,
Circuit Judge

s/ Amalya L. Kearse
AMALYA L. KEARSE,
Circuit Judge

APPENDIX G—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 6, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of October one thousand nine hundred and eighty-six.

Present: HONORABLE WILFRED FEINBERG,
Chief Judge,
HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

86-2035

HERBERT BADGLEY, ET AL.,

Plaintiffs-Appellants,

v.

JOSEPH J. SANTACROCE, Sheriff of Nassau County, ET AL.,

Defendants-Appellees.

ORDER

It is hereby ORDERED that the stay of mandate ordered on September 23, 1986, and extended on September 25, 1986, and further extended on September 29, 1986, is terminated. The

county defendants have informed this Court that their prior motion for a 30-day stay is now withdrawn, and leave to withdraw that motion is granted. It is further ORDERED that the provisions of paragraph 31 of the amended consent judgment shall become effective at 12:01 a.m. October 8, 1986. It is further ORDERED that, in the event of any failure by the county defendants to implement paragraph 31 of the amended consent judgment after 12:01 a.m. October 8, 1986, the liability of the county defendants for civil contempt compensatory damages, as specified in this Court's opinion filed August 25, 1986, shall accrue with respect to any prisoner admitted to the Nassau County Correctional Center after 12:01 a.m. October 8, 1986, in violation of the terms of the amended consent judgment. The mandate, which was previously recalled on September 23, 1986, is ORDERED to be issued forthwith and shall include this Order.

s/ Wilfred Feinberg
WILFRED FEINBERG,
Chief Judge

s/ Jon O. Newman
JON O. NEWMAN,
Circuit Judge

s/ Amalya L. Kearse
AMALYA L. KEARSE,
Circuit Judge

86 - 1046

No.

Supreme Court, U.S.
FILED
DEC 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH J. SANTACROCE, Sheriff of Nassau County; and WALTER J. FLOOD, Warden of Nassau County Correctional Center, individually and in their official capacities,

Petitioners,

vs.

HERBERT BADGLEY, JAMES BARNES, MITCHELL CHAPMAN, ROBERT GUNSBERG (a/k/a ROBERT ALVINO), MAURICE McCORKLE, FRANK RICCHIUTI, OSCAR RODRIGUEZ and HENRY SMITH, inmates of the Nassau County Correctional Center and EUGENE CHAPMAN, LEE McCORKLE and KATHERINE RICCHIUTI, members of inmates' families, individually and on behalf of all persons similarly situated; WILLIAM G. McMAHON, Chairman, New York State Commission of Correction; and THOMAS A. COUGHLIN, III, Commissioner, New York State Department of Correctional Services, individually and in their official capacities,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

MATTHEW MURASKIN
Counsel for Respondents
Attorney in Chief
Legal Aid Society of
Nassau County
33 Willis Avenue
Mineola, New York 11501
(516) 294-2610

Of Counsel:

MORTON J. MARSHACK
SHARON E. KIVOWITZ

EDITOR'S NOTE

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REGULATORY PROVISIONS INVOLVED

9 New York Code of Rules and Regulations section 7300.6(b). Procedures

> (b) It shall be the responsibility of the administrator of an affected facility to identify another facility or a suitable place within the county which may be designated as a substitute jail for such facility. If such suitable place exists, he shall communicate its existence to the commission.

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Joseph J. Santacroce, Sheriff of Nassau County; and Walter J. Flood, Warden of Nassau County Correctional Center, individually and in their official capacities,

Petitioners,

vs.

Herbert Badgley, James Barnes, Mitchell Chapman, Robert Gunsberg (a/k/a Robert Alvino), Maurice McCorkle, Frank Ricchiuti, Oscar Rodriguez and Henry Smith, inmates of the Nassau County Correctional Center and Eugene Chapman, Lee McCorkle and Katherine Ricchiuti, members of inmates' families, individually and on behalf of all persons similarly situated; William G. McMahon, Chairman, New York State Commission of Correction; and Thomas A. Coughlin, III, Commissioner, New York State Department of Correctional Services, individually and in their official capacities,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief in Opposition

STATEMENT OF THE CASE

This section 1983 class action

concerning overcrowding at the Nassau County Correctional Center ("NCCC") was nearly into its fifth year when the amended judgment was signed in October 1984. It had been settled by a consent judgment entered October 7, 1981, but there followed "three years . . . without compliance." Badgley v. Varelas, 729 F.2d 894, 903, n. 10, 897, 899-900 (2d Cir. 1984) ("Badgley I"). The original judgment was intended to finally resolve the inmates' claims of unconstitutional overcrowding against the defendant Sheriff and Warden by expansion of capacity through construction of dormitory units and addition of second bunks in many cells, with assurances that the population, to be controlled in the first instance by durational limitations on the use of double-celling and a ban on the use of cots and mattresses in common areas, would not exceed an established cap and

that essential services would be provided. Id. at 896.

In February 1984, in Badgley I, the Second Circuit reversed remedial orders directed against certain State defendants not parties to the judgment, "in view of the availability of a remedy that may be directed solely to the parties who signed [it]." Id. at 901. The court found that at least with respect to violation of the population cap "the time for prompt and effective action had arrived" (id. at 903, n. 10), but concluded that an order providing for the release of inmates was "not warranted." Id. at 902. Rather, it mandated a "prohibition on intake" calculated to "rapidly secure compliance with [the] population limit" and "serve the salutory purpose of forcing all of the various state and local agencies who either have a need to place people in confinement or the responsibility for

providing detention facilities, or both, to face up to the challenge of making alternative arrangements." Id. With respect to the anticipated effects of the remedial order, the court wrote:

> If the NCCC were closed today because of a natural disaster such as fire or disease, we have little doubt that the responsible officials of New York State and Nassau County would figure out some way to confine tomorrow those arrested by the police and sentenced by the courts. The persistent violation of the population limit of the consent judgment - a violation now entering a fourth year - is an equivalent disaster.

Id., citing N.Y. Correction Law section 504, subdivision 1 of which provides for use in such emergencies of "another suitable place within the county or the jail of any other county" as a "substitute jail."

The District Court held a hearing on the effective date of the remedial order and thereafter modified the judgment,

inter alia, by increasing the population cap (25a).[1] The amended consent judgment that followed (1a-16a) redefined the maximum in-house population. There were 992 (instead of 939) approved bedspaces, but the in-house population might not exceed 710 plus the number of inmates actually housed (up to 157) in the theretofore underpopulated dormitories. Thus, the maximum in-house population was generously increased from 808 to 867. The judgment incorporated, in paragraph 31, the remedial order originally entered at the Second Circuit's direction, with appropriate numerical adjustments and an exception for acceptance (but not exclusion from the count) of the most serious alleged offenders. It also eased the limitations on double-celling. In

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[1]References in parentheses followed by the letter "a" are to the petitioners' appendix.

return, the defendants agreed to a five-year construction and renovation program (25a-26a).

On October 7, 1985, the defendants began housing inmates in excess of 710 in the core facility cells (19a). Since this violated the pivotal population cap (paragraph 4), and perforce the very specific directive in paragraph 31, the inmates filed the motion at issue.

The defendants waived their right to a hearing and the motion was decided on the material facts not in dispute (id.). The defendants asserted, inter alia, a shortage of bedspace in the jails of other counties for the transfer of additional inmates (the practice had been effected on a large scale since 1981) under Correction Law section 504(1). With reference to the use of other buildings within the County as substitute jails, the defendants initially claimed that such buildings were

not available, but later conceded that the obstacles were political (community opposition), the very same considerations that had stalled the construction program at the jail itself (29a). The defendants presented no evidence whatsoever of any efforts to obtain substitute facilities within Nassau County (id.).

The District Court found that the defendants had made "every reasonable effort to comply with the directions in the decree and in particular with the order to keep the inmate population below the maximum of 710" (19a-20a). It was "impossible for them to comply . . . without the assistance of the state officials" (20a). Compliance (with paragraph 31, the remedial order) would conflict with the defendants' statutory duties (id.). Their failure to comply (with the more general directive of paragraph 4, the population cap) was not

"a willful disobediance" [id., quoting In re Weiss, 703 F.2d 653, 660 (2d Cir. 1983)].

The District Court further found that the State, as opposed to the County defendants, had the power to relieve the overcrowding (id.). It invited further motions and stated that "upon a showing that state officials are violating the constitutional rights of the inmates, the court will consider appropriate measures to insure compliance with the decree" (21a).

Given what must be considered a topsy-turvy view of the relevant law in the District Court, and recognizing that the case, which had been argued four times in the circuit court (three before Judge Newman), had become "a Dickensian saga of prison overcrowding and beaurocratic excuse and delay" (24a), the Second Circuit reversed and simply directed that

the remedial provision it had drafted in 1984 be put into effect, after a 30-day delay but with the imposition of substantial sanctions in the event of noncompliance (32a-33a).

SUMMARY OF ARGUMENT

The Court of Appeals corrected the District Court's misapprehension of a remedial order directed by it several years earlier and of various determinative legal principles. Accordingly, there was no misapplication of Rule 52(a). In any event, the conclusion of impossibility in this jail overcrowding context was independently reviewable, especially by an appellate panel very familiar with the case and the intractable problems underlying it.

Petitioners' "'hostage' theory" objection to implementation of the remedial prohibition on intake is baseless

because petitioners are subject to the court's very specific directive and there is nothing to indicate that compliance with it, although perhaps difficult, is impossible. The objection would have properly been, in any case, directed at the remedial order itself, not its re-implementation with a directive that it is to be enforced. Petitioners not only failed to seek reconsideration or review of the remedial order entered in 1984, but affirmed their commitment to it by its inclusion in the amended consent judgment.

The mandate includes the specification of a sanction very obviously designed to coerce compliance. It is prospective and the nexus between it and the remedial order could not be more direct. The court's direction that the damages be assessed in favor of the plaintiff class

rather than paid into the U.S. Treasury is not objectionable. The District Court, if need be, is fully capable of distributing the money in an appropriate manner implementing the aims of the injunction issued on respondents' behalf or otherwise redressing the respondents' complaints in this case.

The remedial order and the more recent directive to re-implement it are actually examples of judicial restraint and due deference to correctional authorities, especially in light of the dearth of progress made during the many years since the action commenced. Most significantly, petitioners' protestations to the contrary notwithstanding, the mandate can accomplish its intended purpose, and, as petitioners in relating the more recent history largely concede, has done so already.

REASONS FOR DENYING THE WRIT

I.

As the District Court's determination was riddled with mistaken impressions of the applicable law the Court of Appeals properly set it aside and, since the record plainly did not support a finding of impossibility, upheld the remedial order as a matter of law.

Petitioners propose a constricted definition of the appropriate appellate function in this case, wherein the Court of Appeals, after properly reviewing the record in its entirety, enforced a remedial order previously entered at its direction. Not having bothered to seek reconsideration or review of the order carefully fashioned in Badgley I, petitioners had affirmed their own commitment to it in the amended consent decree, then risked contempt by disregarding it. The District Court, convinced that the Court of Appeals' unimpeachable assignment of responsibility

to the parties bound by the judgment, and primarily responsible under State law, was incorrect, bottomed its refusal to enforce the unambiguous and absolute requirements of paragraph 31 on a purported conflict between the petitioners' obligations under the judgment and their duties under State law. The court misapprehended the terms of the remedial order, the operation and effect of New York law in this regard, and the law with respect to petitioners' authority under New York's Correction Law section 504(1) as well. These "errors of law," relevant to the enforcement of the prohibition on intake, the Court of Appeals could "of course, correct." United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948). "[T]he record permit[ting] only one resolution of the factual issue" [Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982)], the court

properly directed appropriate relief. See, e.g., Bigelow v. Virginia, 421 U.S. 809, 826-27 (1975).

The District Court, however, had focused its decision less pointedly and reached the unfounded conclusion that the petitioners were unable to comply based upon their good faith efforts to maintain the population below the ceiling in paragraph 4. Finding that they had made "every reasonable effort" in this regard, short of compliance with paragraph 31, the court concluded that their failure "was not a willful disobedience of the decree" (19a-20a). Again, petitioners misconstrue the Court of Appeals' decision, which reversed the District Court's ill-conceived determination. Reliance on lack of willfulness, that is, on good faith alone, as a defense is a clear misreading of the settled law on civil contempt. See

McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). Nothing in In re Weiss, 703 F.2d 653 (2d Cir. 1983), cited by the District Court, suggests otherwise. Similarly, the conclusions of the District Court are infected by erroneous, although not specifically stated, views of the settled law on impossibility (27a-28a) and the burden of production of evidence of it sufficient to raise a question of fact (31a). Finally, the court's misunderstanding of the operation of Correction Law section 504 and of the division of responsibility for prisoners between the County defendants and State agencies contributed to the findings regarding paragraph 4 as well. Since the court misapprehended the legal standard and principles involved, the Court of Appeals was not bound by the clearly erroneous standard and properly reversed as a matter

of law. See United States v. Singer Manufacturing Co., 374 U.S. 174, 194, n.9 (1963); Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485, 501 (1984) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law").

Alternatively, the determination of impossibility of compliance in a case such as this "clearly implies the application of standards of law" Baumgartner v. United States, 322 U.S. 665, 671 (1944). The burden to produce evidence showing "categorically and in detail" that compliance was impossible [United States v. Rylander, 460 U.S. 752, 755 (1983)] "would be lost" in such a case if "whether

that exacting standard of proof had been satisfied on the whole record were deemed to be a 'fact' of the same order as all other 'facts,' not open to [independent] review . . . ." Baumgartner v. United States, supra, 322 U.S. at 671.[2] Since "the relevant legal principle [here] can be given meaning only through its application to the particular circumstances of [the] case, [this] Court [would be] reluctant to give the trier of facts' conclusions presumptive force and, in so doing, strip [the] federal appellate court of its primary function as an expositor of the law." Miller v. Fenton, 474 U.S. ____, ____, 88 L.Ed.2d 405, 413

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[2] The appellate court was, it happens, quite familiar with the history of this case. After oral argument of the inmates' appeal of the 1984 modifications, the panel withheld decision while Judge Newman acted as a mediator in discussions leading to entry of the amended consent judgment, after which the appeal was withdrawn.

(1985). That was, in part, the role the Court of Appeals played here, in a case which it had followed closely over a period of years, and it was especially fitting for it to do so as "the substantive law at issue" is one where "the stakes - in terms of impact on future cases and future conduct - are too great to entrust [even the largely factual questions] finally to the judgment of the trier of fact." Bose Corporation v. Consumers Union of United States, Inc., supra, 466 U.S. at 501, n.17.[3]

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[3] It should also be noted that, notwithstanding the Court of Appeals' own labeling of its conclusions those of the District Court were "clearly erroneous" under Rule 52(a). Its "interpretation of the facts [was] illogical [and] implausible." Anderson v. Bessemer City, 470 U.S. ___, ___, 84 L.Ed.2d 518, 530 (1985). It was not one of "the permissible views." Id., 84 L.Ed.2d at 528.

Surely, in this regard, the Court of Appeals was also aware that the standard for review of the denial of civil contempt (cont'd)

As the Court explained in Bose, supra, 466 U.S. at 501, n. 17:

> A finding of fact in some cases is inseprable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between the application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.

(cont'd)
is whether the District Court abused its discretion [see Lemon v. Kurtzman, 411 U.S. 192, 200 (1973); Jewel Tea Co. v. Kraus, 204 F.2d 549, 551 (7th Cir. 1953)]. Abuse of discretion occurs "when no reasonable person could take the view of the trial court." Harrington v. DeVito, 656 F.2d 264, 269 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982). But see McComb v. Jacksonville Paper Co., supra, 336 U.S. at 191 ("grant or withholding of remedial relief is not wholly discretionary" as "[t]he private or public rights that the decree sought to protect are an important measure of the remedy").

It may be assumed that the Court of Appeals would have reversed the determinations as "clearly erroneous" had it not focused instead on the District Court's misinterpretations of controlling legal principles and rules as a matter of law.

This instant case is one where it would have been appropriate for the Second Circuit to cross that line had the case required it. Cf. Mucha v. King, 792 F.2d 602, 605-06 (7th Cir. 1986) (distinguishing on jurisprudential grounds cases, such as the one before it, where "the only question is the legal significance of a particular and nonrecurring set of historical events," id. at 606).

Petitioners contend that their failure to have ever sought and been denied alternate places to house inmates, especially within the County, was a "strawman" set up by the Court of Appeals (29a). In fact, the petitioners produced no evidence that they had, claiming first that no suitable places were available within the County but later conceding that political problems (community opposition)

prevented them from seeking any. Nor was the applicability of New York Correction Law section 504(1) "illusory." The New York Court of Appeals has held that "over-population" in a jail triggers the provisions of section 504(1). In re Adams, 63 N.Y.2d 868, 870 (1984). The State Commission of Correction's role is, as petitioners relate, supervisory. It is the Sheriff who must exercise his discretion in identifying a substitute jail and requesting its designation. 9 New York Code of Rules and Regulations section 7300.6(b). That is precisely what he failed to do despite the Second Circuits pointed reminder in its decision directing entry of the remedial order. Badgley I, supra, 729 F.2d at 902 & n.9; cf. Miller v. Carson, 524 F. Supp. 1174 (M.D. Fla. 1981) (state agency authorized to contract with private hospitals for

bedspace). It ill-behooves the petitioners to waffle on this point now, claiming that an application for the designation of a specified substitute jail within the County, which they had not made, might be denied. See Petition at 10-11.

Petitioners also criticize the Court of Appeals for going outside of the present record to that of an earlier appeal in this case and citing testimony of the Administrative Judge of Nassau County regarding the absence of a conflict between petitioners' duties under State law and the remedial order directing them not to house inmates at the NCCC. Petition at 11. First, it should be noted that the petitioners did not object to references to that record until now. Second, the administrative judge's testimony was simply a summary of the

relevant State law. The courts do not remand to a particular facility, but to the Sheriff, who since the inception of this action has operated two jails within the County, only one of which is the subject of it. Under section 504(1), the Sheriff may use the jails of other counties, which he has done, or establish substitute or temporary jails within the County, which he finally did after the effective date of the Court of Appeals mandate herein.

The District Court apparently failed to understand that the prohibition on intake at the NCCC is just that and does not authorize, let alone require, the Sheriff to refuse custody of inmates remanded to him. In any event, an attack on the remedial order could not be mounted in the instant civil contempt proceeding. See Maggio v. Zeitz, 333 U.S. 56, 69 (1948);

Oriel v. Russel, 278 U.S. 358 (1929).

It would appear, however, that what initially "foster[ed] the experiment with disobedience" [Maggio v. Zeitz, supra, 333 U.S. at 69] was the District Court's adamant refusal to accept the State's division of responsibility for prisoners between the counties and the central government. Despite the Second Circuit's holding on this issue in Badgley I, supra, 729 F.2d at 900-01, a record devoid of any indication of State responsibility, and the governance of this case by consent judgment since 1981, the District Court's decision invited the parties to litigate the constitutionality of conditions at the NCCC so that the State, assuming some unknown basis for its liability would materialize, could be made to effect for the County compliance with the consent judgment (21a).

Given the predilictions of the District Court, it is not surprising that the standard imposed by it was watered-down beyond even whether petitioners had "the present ability to comply with the court's order in any meaningful sense." See United States v. Wendy, 575 F.2d 1025, 1031 (2d Cir. 1978) (finding Wendy had the ability to comply "technically" but "realistically" was incapable of doing so, id. at 1030). Arguably, the standard in the instant case should have been absolute because of the unequivocal directive in paragraph 31. Assuming, however, petitioners' "momentary inability to comply," that "cannot be deemed 'impossibility'", for "[if it were, defendants would evade court orders simply by refusing to take preliminary steps toward compliance . . . ." Fortin v. Commissioner, 692 F.2d 790, 797, n.9 (1st

Cir. 1982); cf. United States v. Swingline, 371 F. Supp. 37, 44 (E.D.N.Y. 1974) (where, as here, the proof showed at most "that performance was difficult and that it would have required more intensive effort than [the County] was willing to devote to the task").

In sum, petitioners demonstrate no usurpation of the fact finding function warranting a writ of certiorari. Rather, the Court of Appeals appropriately reviewed its own equitable order, which had subsequently been incorporated into the amended consent judgment.

II.

The Second Circuit's direction neither espoused a "'hostage' theory of contempt" nor conflicts in the least with the decision of another court of appeals.

The Eleventh Circuit's decision in Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984), reversed a contempt order against the Alabama Attorney General. The Attorney General, however, was not a signatory of the consent decree there (Id. at 1517) and had not violated any specific orders of the court (id. at 1529). Nor did he have the ability to bring the prison system into compliance with the orders of the court. Id. at 1528. Finally, while he may have placed "stumbling block[s]" in the paths of others (id. at 1527), the citation was held to be impermissible in that these were "either activit[ies] for which the Attorney General could not be held directly responsible or conduct not

clearly violative of the order." Id. at 1529.

In sharp contradistinction, petitioners herein were signatories of the consent judgment in 1981 and of its amendment in 1984 and ignored specific directives prohibiting them from taking actions completely and exclusively within their control.

It was petitioners' burden to show "categorically and in detail" that compliance was impossible. United States v. Rylander, 460 U.S. 752, 755 (1983). The record is devoid of any evidence of efforts, however minimal, towards the establishment of a substitute facility within the County. Also conspicuously absent is any evidence of the Nassau County Executive or Board of Supervisors or any other County official or agency failing to cooperate with them in this or

in any other regard. In fact, the money for the five-year construction program had already been appropriated when the agreement to the amended judgment was signed by them in 1984.

Petitioners contend that the direction to the Sheriff is particularly unfair because under New York law he is personally liable for fines or damages incurred by him. Petition at 18. While petitioners do not hesitate to go outside the record to bring other matters to the Court's attention, they neglect to advise that in an order dated October 17, 1986, consented to by respondents and the County of Nassau, the County was added as a party to this action for the express purpose of eliminating any doubt as to its liability for any actions of the Sheriff with relation to the mandate.

In sum, the Second Circuit was fully

congnizant of the Sheriff's lack of control over the flow of inmates remanded to him. The court's recognition that cooperation by other governmental entities would be desirable and might be induced [see Badgley I, supra, 729 F.2d at 902; Badgley v. Santacroce, 800 F.2d 33, 37 (2d Cir. 1986) (29a)] cannot seriously be argued to detract from the orders' effectiveness or suitability.

III.

The coercive sanction directed in the mandate is neither arbitrary nor ambiguous, or otherwise improper.

Contrary to the petitioners' assertions, the Court of Appeals' direction to the District Court to "hold the county defendants in civil contempt in the event of any subsequent failure to implement paragraph 31 of the amended consent judgment and, in that event, to assess compensatory damages in favor of the plaintiffs of not less then $5000 for each person admitted to the NCCC in violation of the amended consent judgment . . ." (emphasis added) (27a) although phrased as compensatory damages, was clearly intended to coerce future compliance with paragraph 31.

Judicial sanctions in civil contempt proceedings "may be employed for either or both of two purposes: to coerce the defendant into compliance with the court's

order, and to compensate the complainant for losses sustained." United States v. United Mine Workers, 330 U.S. 258, 303-304 (1947). By phrasing the direction in terms applicable to future events, the Court of Appeals indicated an intention neither to punish the defendants for their past contemptuous behavior nor to compensate plaintiffs for actual loss resulting. Rather, painfully aware of the petitioners' six year history of "beaurocratic excuse and delay" (24a), the court obviously considered the "character and magnitude of the harm threatened by [the] continued contumacy" [United States v. United Mine Workers, supra, 330 U.S. at 304] and directed sanctions sufficient to assure compliance, for which of course there is no necessity of proof of actual harm.

The prospective direction has, to date,

had its desired effect. As related in Point IV of the petition, since entry of the mandate, petitioners have constructed a temporary modular building, which has contributed to reducing the in-house population and together with other actions taken thus far prevented the imposition of sanctions.

In the event the Court of Appeals intended the fine, if one is required, to be paid directly to the plaintiffs as compensation, the Court has affirmed such fines when they serve to "vindicate[d] the [District] Court's authority over a recalcitrant litigant." Hutto v. Finney, 437 U.S. 678, 691 (1978). In Hutto v. Finney, the lower court awarded attorney's fees for bad faith without regard for the actual cost of compensating counsel. In affirming, the Court wrote:

"[c]ompensation was not the sole motive

for the award . . . . [W]e see no reason to distinguish this award from any other penalty imposed to enforce a prospective injunction." Id. Thus, although an award is termed compensatory, it may be coercive and prospective in nature.

Furthermore, as petitioners contend, there must be a nexus between the sanction imposed and the correction of a violation. They cite as authority for a supposedly insufficient nexus herein, the Third Circuit's decision in Inmates of Allegheny County Jail v. Wecht, 754 F.2d 120 (3rd Cir. 1985), a case which is clearly distinguishable.

In Inmates of Allegheny County Jail v. Wecht, the Third Circuit overturned a sanction which required the county to pay $5000 for each prisoner released to comply with the population limits in the jail. This "contempt" sanction was aimed at

"coercing the County into spending funds needed to develop and implement a plan for an alternative housing arrangement." Id. at 129. However, under the terms of the court's prior order, the County was never given "any specific direction to prepare and implement an alternative plan for housing inmates." Id. As the Third Circuit stated, "wishes are not orders", and thus a finding of contempt and the $5000 penalty per inmate released was inappropriate, as the sanction was not for the enforcement of any order and as the County was fully complying with all orders.

In the instant case, on the other hand, a specific order had not been followed, and as argued above, the Second Circuit properly refused to excuse such non-compliance.

The Second Circuit declared that the injunction contained in paragraph 31 was

to be operative thirty days after the date of its decision and that any subsequent failure to implement it would result in the assessment of damages. Federal courts should not be reduced to issuing injunctions and hoping for compliance: "Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties . . . . Civil contempt proceedings may yield a . . . fine." Hutto v. Finney, supra, 437 U.S. at 690; see United States v. United Mine Workers, supra, 330 U.S. at 305. Thus, the mandate of the Second Circuit, was appropriate in light of the violations that had previously occurred.

Petitioners' attempt to buttress their argument by stating that certiorari should be granted because of the lack of specific guidelines for implementation is

meritless. Nothing in the Second Circuit's decision prevents the District Court from specifying how the collected fines should be spent. The mandate does not even suggest that the fines must be paid directly to the plaintiffs.

Fines for contempt have been used, in various ways, to implement the aims of injunctions or to "redress the situation originally complained of by plaintiffs." Haldeman v. Pennhurst State School and Hospital, 526 F. Supp. 423, 427 (E.D. Pa. 1981). Authority exists for the creative use of fines collected in a variety of cases including some concerning jail overcrowding. For instance, in Mobile County Jail Inmates v. Purvis, 581 F. Supp. 222 (S. D. Ala. 1984), the court used a portion of collected fines to pay

bail bond fees. Id. at 225.[4] See also Benjamin v. Malcolm, No. 75 Civ. 3073 (S.D.N.Y. Oct. 31, 1983). In Halderman v. Pennhurst State School & Hospital, supra, the court used the contempt fines to compensate special masters. Nothing prevents the District Court from fashioning a method for disbursement of the funds in accordance with the goals of the amended consent judgment.

Finally, the petitioners argue that other problems with the mandate are increasingly likely to occur. However, the situations posited do not conern the recent mandate, but rather paragraph 31

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[4] After the contempt was purged by completion of the extensive construction required, the court returned to the County $4,000,000 which had accrued at a rate of $5000 per day. See Mobile County Jail Inmates v. Purvis, 600 F. Supp. 788 (S.D. Ala. 1985).

itself, a remedial provision ordered by the Second Circuit in 1984 and agreed to by the petitioners in the amended consent decree. The instant decree was signed with full knowledge by all parties that the total population fluctuates a great deal on a daily basis and peaks at various times of the year. Not having sought review of Badgley I, and having obtained the benefits of the consent decree, the petitioners should not be permitted to ignore the affirmative obligations imposed by it without the imposition of penalties. See Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985).

As the clear intent of the mandate was to coerce future compliance with paragraph 31 and the District Court is free to fashion a reasonable disbursement of funds, certiorari should not be granted.

IV.

The Court of Appeals followed this Court's policy of judicial restraint toward the administration of correctional facilities.

To avoid intruding too sharply into matters of largely state and local concern, the Second Circuit entered an order in the fourth year of this litigation which it expected would secure respondents their rights and induce parties and non-parties alike to face up to the challenge presented by the crisis at NCCC. Badgley I. The court rejected more radical proposals for orders requiring the release of inmates. Badgley I, supra, 729 F.2d at 901-02. Such orders, it should be noted, had been entered by other courts on less compelling records. See Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983); Benjamin v. Malcolm, 75 CIV 3073 (S.D.N.Y., November 4, 1983). The less intrusive order herein, like that

in Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.), modified on other grounds, 688 F.2d 266 (1982), cert. denied, 460 U.S. 1042 (1983), was in conformity "with the doctrine that a court must exercise '[t]he least possible power adequate to the end proposed.'" Shillitani v. United States, 384 U.S. 364, 371 (1966), quoting, Anderson v. Dunn, 6 Wheat 204, 231, 5 L.Ed. 242, 248 (1821).

Implementation of the remedial order, which in turn enforces the population cap and was incorporated into the amended consent judgment, is now challenged by petitioners as "need less interference", as only based on a consent judgment anyway, and as no longer necessary because it has worked thus far.[5] These claims do

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[5] With respect to the Sheriff's "financial ruin" (Petition at 24), the Court is respectfully referred to the revelations in Point III, supra.

not justify granting a writ of certiorari.

Two and one-half years after its decision in Badgley I, the Court of Appeals, confronting blatent disregard of its enforcement order, again declined more intrustive approaches proposed. Rather, the court held that paragraph 31 would become operational 30 days after entry of the mandate and that any subsequent violations would be punishable by contempt and sanctions (32a-33a).

The restrained approach of the Court of Appeals in Badgley I, and again in Badgley II, are entirely consistent with the principles outlined by the same court in Dean v. Coughlin, 804 F.2d 207 (2d Cir. 1986).

The assertion by petitioners that since there are no proven constitutiona deficiencies to remedy, the court should

be even more circumspect is fatally flawed. As the Court recently noted, "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial . . . ." Local Firefighters v. Cleveland, 478 U.S. ____, ____, 92 L.Ed.2d 405, 421 (1986). The Second Circuit, in fashioning the mandate it did, sought merely to coerce the petitioners into compliance with what they had previously agreed upon. In enforcing its orders, "a court has broad discretion in the context of contempt to fashion an order to coerce compliance with a prior judgment." Perfect Fit Industry, Inc. v. Acme Quilting Co., 673 F.2d 53, 56-57 (2d Cir.), cert. denied, 459 U.S. 832 (1982).

Consent judgments have attributes of both contracts and judicial acts [see

United States v. ITT Continental Baking Co., 420 U.S. 223, 236 (1975)]; they are entered after careful negotiation has produced agreement as to their precise terms. See United States v. Armour & Co., 402 U.S. 673, 681 (1971). The court is not at liberty to expand or contract the agreement absent a motion to modify. See Berger v. Heckler, 771 F.2d 1556, 1558 (2d Cir. 1985).

If petitioners have "come forward with a reasonable plan" (anticipated completion of a 300-bed modular facility, a system of bail review, electronic surveillance at home, and construction of a temporary 80-bed modular building) (Petition at 23), as theyclaim, first on the heels of the plaintiff's motion for a finding of contempt and then after the Second Circuit's recent mandate, it only further proves the effectiveness and

appropriateness of the court's orders, and the possibility of compliance. See Pesaplastic, C. A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1522 (11th Cir. 1986).

CONCLUSION

For these reasons a writ of certiorari to review the mandate of the United States Court of Appeals for the Second Circuit in Badgley v. Santacroce should be denied.

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Respectfully submitted,

MATTHEW MURASKIN
Counsel for Respondents
Attorney in Chief
Legal Aid Society of
Nassau County
33 Willis Avenue
Mineola, NY 11501
(516) 294-2610

OF COUNSEL:

MORTON J. MARSHACK
SHARON E. KIVOWITZ